83-509

No. _____

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1983

DAVID A. FELDMAN,

Petitioner,

- against -

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

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QUESTION PRESENTED

I. Does the due process clause of the Fifth Amendment as interpreted in In Re Winship 397 U.S. 358 (1970) and its progeny as well as the Sixth Amendment right to a jury trial require a jury instruction in a mail and wire fraud case that specific intent to defraud is an essential element of the offense, and prohibit instructions which substantially reduce the government's burden of proof by (1) permitting the jury to convict on the basis of only "one" of the fraudulent representations or acts alleged to be part of the scheme to defraud (where many such representations and acts involve conduct that does not, per se, violate the mail fraud statute), and by (2) directing a verdict on the essential element of the existence of the scheme to defraud?

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IN THE

SUPREME COURT OF THE UNITED STATES

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DAVID A. FELDMAN,

Petitioner,

v.

UNITED STATES OF AMERICA,

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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

Petitioner David A. Feldman respectfully prays that a writ of certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Seventh Circuit entered in this proceeding on June 29, 1983.

OPINIONS BELOW

The District Court wrote no opinion on the issues submitted here. The Court of Appeals' opinion on the merits is not yet officially published and is reproduced herein at Appendix B, pp. 16a *et seq*.

JURISDICTION

The Seventh Circuit's judgment was dated June 29, 1983. The order denying rehearing and rehearing *en banc* was dated August 18, 1983. Jurisdiction is invoked under 28 U.S.C. § 1254(1) and Rule 17 of the Rules of this Court.

CONSTITUTIONAL PROVISIONS AND STATUTES

CONSTITUTION: Fifth Amendment
Sixth Amendment

STATUTES: 18 United States Code Section 1341

18 United States Code Section 1343

Each of the above is set forth in Appendix G, pp. 92a et seq.

STATEMENT OF THE CASE

On April 10, 1981, petitioner David A. Feldman, an options broker, was indicted in the Northern District of Illinois, Eastern Division, accused of participating with George Joyner in a scheme to defraud Feldman's employer, Merrill Lynch, by (a) concealing from the firm his own 50% interest in Joyner's options account at Merrill Lynch and (b) using forged bank guarantee letters to fulfill the margin requirements necessary to trade in the options market. After a five day jury trial at which Joyner was the principal Government witness, Feldman was convicted on all charges of mail fraud (18 U.S.C. § 1341) and wire fraud

(18 U.S.C. § 1343). The appeal was argued January 7, 1983. Nearly six months later, the Seventh Circuit affirmed petitioner's conviction.

The principal issue at trial was whether Feldman knew that the bank guarantee letters were fraudulent.

I. Facts Forming the Basis of the Conviction

The evidence at trial showed that Feldman, a registered securities broker with expertise in the complex and specialized area of options trading, had been employed by Merrill Lynch for several years, and had advanced at that firm to become, in 1977, Manager of its Hollywood, California office. During 1976, while working in the Chicago area, he had become acquainted with George Joyner, a wealthy local businessman who was at that

time the controller of Brinks, Incorporated and owner of three women's apparel stores. Joyner expressed an interest in trading in the options market, and after Feldman moved to California, the two set up an investment partnership. An account was opened at Merrill Lynch in the name of Western Investment Company; documentary evidence showed that Feldman and Joyner shared equally in the proceeds of that account, although the papers filed with Merrill Lynch did not reflect Feldman's interest in the partnership. Feldman processed all the transactions for the account at Merrill Lynch.

As Feldman provided the expertise in options trading, Joyner provided the financial resources of the partnership. He contacted his own banker at Harris Trust and Savings Bank to make arrangements for guarantee letters to satisfy Merrill

Lynch's collateral requirements. Feldman and Joyner met with Joyner's banker, who subsequently advised Joyner that the Bank would be unable to enter into the proposed credit arrangement. Thereafter, using a form of guarantee letter Feldman had sent him, Joyner forged guarantee letters on Harris Trust and Savings Bank letterhead. Joyner also arranged for an answering service to answer calls and receive mail for what he fraudulently represented to be the Options Department of the Harris Bank. Joyner's testimony, which was vigorously attacked, provided the only direct evidence that Feldman knew anything at all about the fraudulent nature of the bank guarantee letters.

In February, 1978, an expired guarantee letter was delivered by mistake to the Harris Bank. Bank officials recognized it as a forgery, notified Merrill

Lynch of the problem, and confronted Joyner. Although Joyner tried to extricate himself by offering rather implausible explanations of the letter, the bank officials told him they were unconvinced and planned to pursue an investigation. When, soon after, Joyner was interviewed by agents of the Federal Bureau of Investigation, he shifted responsibility for the affair to Feldman, in an apparent effort to obtain lenient treatment for himself by implicating his partner. Eventually, Joyner negotiated a plea agreement with the Government pursuant to which he testified at trial against Feldman.

The trial court excluded evidence that, according to Feldman's polygraphy examination, he had no knowledge that the bank guarantee letters were fraudulent.

II. Facts Pertaining to the Conduct of the Trial

At the conclusion of the trial, the judge read to the jury, and sent into the jury room, a relatively brief set of instructions.[1] The instructions were permeated with error, which was the focus of defendant's appeal to the Seventh Circuit.

First, in submitting to the jury the issue of the defendant's participation in the alleged scheme to defraud, the judge never informed the jury that they must find that the defendant acted with specific intent to defraud, a universally recognized element of the offense of mail fraud.

Then, the trial judge instructed the jury, over defense counsel's express

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1. The entire jury instructions are set forth at Appendix F, pp. 56a et seq.

objection, that it was not necessary for the Government to prove all of the "false pretenses, representations and acts" alleged in the indictment, so long as "one . . . of them be proved which shows the existence of the scheme to defraud." A number of the fraudulent representations and acts alleged in the indictment related solely to Feldman's failure to disclose to Merrill Lynch his interest in Joyner's account, which -- by itself -- does not constitute mail fraud. In summation, the government had strenuously attacked this limited aspect of Feldman's conduct, repeatedly and with dramatic emphasis characterizing his concealment of his interest in Joyner's account as "a fraud on Merrill Lynch."[2] Under these

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2. A few examples from the prosecutor's summation (set forth more completely in Appendix E, pp. 33a et seq.) demonstrate the telling impression that was left in the jurors' minds:

(footnote continued)

circumstances, the Court's "one act will suffice" instruction permitted Feldman to be convicted for conduct which, as a

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> It is a partnership; 50 per cent for the Feldmans, 50 per cent for the Joyners. This is a fraud on Merril Lynch. It is flat out and simple. (R. 388*)) (emphasis added.)
>
> * * *
>
> This is Feldman's handwriting [on the account applications at Merrill Lynch] (indicating). He filled in all of the information. He did not say anything about the Feldmans being part of it. This is a fraud on Merrill Lynch. (R. 389*) (emphasis added.)
>
> * * *
>
> That is the next item. A phony partnership agreement filed in the Merril Lynch office. This is a fraud on Merrill Lynch. (R. 390*) (emphasis added)
>
> * * *
>
> September 17th, the checks start rolling in from Merrill Lynch. What happens with the proceeds? They go into the Continental Bank; checks go out, one to Augusta Feldman and one to

(footnote continued)

matter of law, did not constitute the offense of mail fraud.

Both these errors were exacerbated by a third instruction which effectively

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G.E. Joyner. You saw the pattern.

It is clear all the way through the scheme. Does Merrill Lynch know? No. This is a fraud on Merrill Lynch. (R. 391*) (emphasis added.)

* * *

[When a customer had exercised an option] [t]hey had to come up with $158,000. He called Joyner. Joyner writes a check on the WIC account for $150,305.92. Feldman unbeknownst to Merrill Lynch -- another fraud on Merrill Lynch -- writes a check in the amount of $49,152.96, exactly one-half. (R. 392*) (emphasis added.)

* * *

He gets Joyner to draft this promissory note which said, 'G.E. Joyner, a partner in Western Investment Company, David Feldman, manager.' This is a fraud.

Feldman's name should have been right there by the 'Partners." This is a fraud on

(footnote continued)

informed the jury that the conduct alleged in the indictment constituted a scheme to defraud, thus impermissibly directing a verdict as to this essential element.

REASONS FOR GRANTING THE WRIT

THE SEVENTH CIRCUIT'S APPROVAL OF JURY INSTRUCTIONS IN A MAIL AND WIRE FRAUD CASE WHICH OMIT ANY INSTRUCTION THAT SPECIFIC INTENT TO DEFRAUD IS AN ELEMENT OF THE OFFENSES, WHICH INVITE CONVICTION ON THE BASIS OF CONDUCT BEYOND THE REACH OF THE MAIL AND WIRE FRAUD STATUTES, AND WHICH PARTIALLY DIRECT A VERDICT AS TO THE "SCHEME TO DEFRAUD" ELEMENT VIOLATES DUE PROCESS, SQUARELY CONFLICTS WITH THE LAW OF OTHER CIRCUITS, AND IS A SUBSTANTIAL DEPARTURE FROM THE STANDARDS OF PROCEDURE WHICH SHOULD GOVERN CRIMINAL TRIALS IN THE FEDERAL COURTS.

This case presents important issues concerning the minimum constitutional requirements for jury instructions in a mail and wire fraud case. The Seventh Circuit has approved jury instructions which nowhere articulated that specific

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Merrill Lynch. R. 395*)
(emphasis added.)

intent to defraud is an essential element of the offense of mail and wire fraud. Furthermore, in charging that the government need prove only "one" of the false representations alleged to be part of the scheme, these instructions permitted the jury to find the defendant guilty on the basis of conduct which does not contravene the mail fraud statute. Both errors were exacerbated by a third instruction which effectively directed a verdict on the essential element of the existence of a scheme to defraud. The Seventh Circuit's acceptance of this erroneous charge creates a new, lower standard for jury instructions in a mail and wire fraud case which sharply conflicts with the law of other circuits, and in effect nullifies the requirement that in a criminal case the jury, and the jury alone, must determine that the Government has

sustained its burden of proof as to "every fact necessary to constitute the crime." In Re Winship, 397 U.S. 358, 364 (1970); Morisette v. United States, 342 U.S. 246 (1952).

I. The Guiding Consitutional Principles

This Court, in In Re Winship, 397 U.S. 358 (1970), held in no uncertain terms that "the Due Process Clause protects the accused against conviction except upon proof beyond a reasonable doubt of every fact necessary to constitute the crime with which he is charged." 397 U.S. 358, 364 (emphasis added). This proof must be established to the satisfaction of the jury, not the trial or appellate court; longstanding precedent prohibits directing a verdict as to any element of the offense in a criminal case. For:

> in a jury trial the primary finders of fact are the jurors. Their overriding

> responsibility is to stand between the accused and a potentially arbitrary or abusive Government that is in command of the criminal sanction. For this reason, a trial judge is prohibited from entering a judgment of conviction or directing the jury to come forward with such a verdict, see Sparf & Hansen v. United States, 156 U.S. 51, 105 (1895); Carpenters v. United States, 330 U.S. 395, 408 (1947), regardless of how overwhelmingly the evidence may point in that direction. The trial judge is thereby barred from attempting to override or interfere with the jurors' independent judgment in a manner contrary to the interests of the accused.

United States v. Martin Linen Supply Co., 430 U.S. 564, 572-573 (1977).

Any instruction which has the effect of substantially reducing the Government's burden of proof is "fundamentally inconsistent" with the rights recognized in In Re Winship. Cool v. United States, 409 U.S. 100, 100 (1972) (per curiam). Morissette v. United States, 342 U.S. 246

(1952) and Sandstrom v. Montana 442 U.S. 510 (1979) fleshed out the principle that to remove from the jury any issue as to an element of a criminal offense would "conflict with the overriding presumption of innocence with which the law endows the accused and which extends to every element of the crime." 442 U.S. 510, 523.

As the Court stated in Connecticut v. Johnson, 51 U.S.L.W. 4175 (1983), "a conclusive presumption on the issue of intent is the functional equivalent of a directed verdict on that issue," 51 U.S.L.W. at 4178. It is no less unconstitutional to effect the same result by not requiring the jury to expressly consider and determine, under appropriately clear instructions, each contested element of the offense. Thus, failure to charge the jury on an essential element

has been held to impermissibly "eliminate[] the Government's burden of proof," United States v. Benedetto, 558 F.2d 171, 177 (3d Cir. 1977), citing Winship. It is against these principles that the jury instructions approved by the Seventh Circuit must be measured. They fall far short.

II. The Failure to Instruct That Specific Intent to Defraud is an Essential Element of the Offense.

In this mail fraud case, where the only contested issue involved defendant's knowledge and intent, the trial court's charge was fatally defective in failing to instruct that "intent to defraud" is an essential element and that the Government must prove that element beyond a reasonable doubt in order for the jury to convict. The Seventh Circuit's labored effort to sanction this omission set a new minimum standard for jury instruc-

tions in such a case, one which simply does not pass constitutional muster.

In the guise of "reading the instructions as a whole", the Seventh Circuit combined phrases from the indictment with various separate portions of the trial court's instructions to create a hypothetical hybrid instruction which was purportedly equivalent to the "intent to defraud" requirement. But the scrambled mix of ingredients on which the appellate court relied for its creative reconstruction of the intent element of the offense was, in fact, wholly insufficient for that purpose. Moreover, such an approach requires the jury to perform the work of judges in deriving a crucial legal standard from a melange of scattered concepts. Instructions which can be upheld only if the jury is presumed to have done the work of judges are tanta-

mount to no instructions at all, for they "transfer to the jury the judge's function in giving the law and transfer to the appellate court the jury's function of measuring the evidence by appropriate legal yardsticks." Bollenbach v. United States, 326 U.S. 607, 613-614 (1946).

In reality, the Seventh Circuit simply created a new standard for the district courts, one which would permit convictions in a mail fraud case where the jury was never informed of the specific intent to defraud requirement. All other circuits have uniformly held that a defendant is entitled to have the jury instructed, in clear and concise language, as to all the elements of the offense with which he is charged.[3]

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3. It has hitherto been universally recognized that failure "to charge an element of the offense is 'plain error' (see Rule 52(b)) requiring reversal even if the point was not raised below." (footnote continued)

Especially when omitted instructions relate to the essential element of knowledge and intent, as distinguished from other, possibly more technical, requirements, the omission has been characterized as virtually per se plain error: the defendant is always prejudiced by the omission. United States v. Brown, 616

United States v. Rybicki, 403 F.2d 599, 603 (6th Cir. 1968); see e.g., United States v. Small, 472 F.2d 818, 820 (3d Cir. 1972) ("plain error was committed in the failure of the court to instruct on all necessary elements of the crime of conspiracy"); United States v. Williams, 463 F.2d 958, 962 (D.C. Cir. 1972) ("any omission of an element of a crime in the instructions to the jury is plain error under Rule 52(b)"); United States v. Hutchison, 338 F.2d 991 (4th Cir. 1964) ("This court cannot and will not affirm a conviction by a jury unless the District Court instructs as to the elements of the offense charged in the information or indictment, whether requested or not.") United States v. Massiah, 307 F.2d 62, 71 (2d Cir. 1962), rev'd on other grounds, 377 U.S. 201 (1964) ("the defendant is entitled to have the jury instructed on all the elements that must be proved to establish the crime charged.").

F.2d 844; fn.7 (5th Cir. 1980).[4] The critical importance of the intent to defraud element has been highlighted in other cases. In United States v. Meadows, 598 F.2d 984 (5th Cir. 1979), the Court reversed a mail fraud conviction because the jury instructions at a critical juncture did not repeat language reminding the jury of the intent required to convict, despite the fact that a completely adequate definition occurred in the instructions only two sentences earlier. The court characterized the omis-

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4. In United States v. Brown, 616 F.2d 844, 847 n.7 (5th Cir. 1980), the court noted that "the cases evidence . . . nearly a per se plain error standard in situations in which the failure of the court to instruct concerns an element of the crime relating to knowledge or intent." See, United States v. Pope, 561 F.2d 663, 671 (6th Cir. 1977); Vaccaro v. United States, 461 F.2d 626, 638 (5th Cir. 1972); United States v. De Marco, 488 F.2d 828, 832 (2d Cir. 1973); United States v. Small, 472 F.2d 818, 819 (3d Cir. 1972); United States v. Thomas, 459 F.2d 1172, 1177 (D.C. Cir. 1972).

sion as "poison[ing] the otherwise healthy charge."

> [T]he question is not whether guilt may be spelt out of a record, but whether guilt has been found by a jury according to the procedure and standards appropriate for criminal trials in the federal courts. Although we realize, of course, that all instructions must be considered as a whole, and not word-by-word or phrase-by-phrase, such a fundamental understatement as to the paramount issue at a critical stage of the instruction requires reversal.

598 F.2d at 987-988. By contrast, that same court upheld a similar instruction concerning material omissions and half-truths, calling it "dispositive" that the trial judge had added the "four critical words . . . . 'With intent to defraud'." United States v. Martino, 648 F.2d 367, 393 (5th Cir. 1981), cert. denied, 456 U.S. 949 (1982).

The Seventh Circuit attempted to excuse the trial judge's fatal omission

of this essential language by reconstructing the same concept from fragments of the indictment and other parts of the charge. Among the ingredients that the Seventh Circuit relied upon in constructing its "acceptable" instruction were the trial court's definitions of "intent to defraud" and "scheme to defraud." While it is true that both phrases were defined in the charge, the jury was given no guidance at all as to their relevance to its deliberations. The jury was not asked to determine whether Feldman acted with intent to defraud, nor was it instructed to consider whether the conduct alleged in the indictment or proved at trial constituted a scheme to defraud.

Other circuits have expressly ruled that a definition of an element of the offense cannot substitute for an instruction that the Government must prove that

very element beyond a reasonable doubt. In United States v. Brooksby, 668 F.2d 1102 (9th Cir. 1982), the trial court had correctly stated the law by reading the indictment and the statute and defining the word "willfully," but incorrectly listed only three of the elements that would be necessary to be proven beyond a reasonable doubt in order to convict the defendant. "[T]he failure to instruct [the jury] that willfulness was an essential element of the crime prejudiced the defendant. The steps already mentioned . . . did not cure the error." 668 F.2d at 1105. The court reversed the conviction. So, too, in United States v. Byrd, 352 F.2d 570, 572 (2d Cir. 1965) the Court reversed a conviction where the trial court's charge had defined criminal intent but "omitted any instruction that criminal intent was an element which the

Government, to convict, was required to prove beyond a reasonable doubt." The Court characterized this as "tantamount to no instruction at all on the subject." United States v. Byrd, supra at 572,574. See also, United States v. Meadows, supra.

The language from the indictment[5] that the Seventh Circuit relied upon as an additional ingredient, is equally inadequate to salvage these instructions. Courts in other circuits have ruled that, where essential elements are omitted from the burden of proof instructions, reference to the indictment cannot substitute. United States v. Pope, 561 F.2d 663 (6th Cir. 1977); United States v. Thomas, 459

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5. The indictment alleged that Feldman, with Joyner, "devised and intended to devise a scheme and artifice to defraud and for obtaining money and property from Merrill Lynch by means of false and fraudulent pretenses, representations and promises."

F.2d 1172 (D.C. Cir. 1972); see also, United States v. Hutchison, supra; United States v. Massiah, supra.

The third fragment of the instructions upon which the Seventh Circuit relied in its effort to reconstruct an "acceptable" charge as to intent to defraud was the language from the trial judge's presentation of the elements of the offense, that, to convict, it was necessary for the jury to conclude "that the defendant knowingly and intentionally participated in the scheme to defraud which is described in the indictment." (Emphasis added.) Slip op. at 10. But the Court's reliance on this language underscores yet another defect in the overall charge. For by this very language the instructions removed from the jury's consideration the question of whether the conduct the government had

proved was a scheme to defraud, and thereby partially directed a verdict as to the essential element, the existence of a scheme to defraud.

Furthermore, the jury in this case was given no hint or clue that the definitional language about "scheme to defraud" should somehow be read together with the term "intentionally and with the language of the indictment, and that using those ingredients, the jury should critically determine whether Feldman acted with "intent to defraud."[6]

Thus, the Seventh Circuit stands alone in expanding the concept of "reading the instructions as a whole" to totally eviscerate the requirement that the jury instructions contain a clear and concise statement of each essential

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6. The jury was not even instructed, as juries frequently are, that all jury instructions were to be considered as a whole.

element which the Government must prove beyond a reasonable doubt. The proper standard has been succinctly stated in United States v. Pope, 561 F.2d 663, supra,

> In determining the propriety of a jury instruction, the instruction must be viewed in its entirety, and a misstatement in one part of the charge does not require reversal if elsewhere in the instruction the correct information is conveyed to the jury in a clear and concise manner so that it is unlikely that an erroneous impression would remain in the minds of the jurors . . . [but] . . . [t]he failure to instruct on an essential element of the offense is "fundamental error" . . . [citation omitted], which cannot be cured by reference to the indictment or by reading the unexplained language of the statute to the jury. 561 F.2d at 670-671. (Emphasis added.)

In Feldman's case, a clear and concise instruction -- that intent to defraud was an essential element -- did not exist at any point in the charge. Instead, the Seventh Circuit approved a

cut-and-paste jigsaw puzzle approach in which the jury, far from being told the law, was required to reconstruct the relevant principle from the language of the indictment and from definitional language in the instructions.

The danger inherent in asking a jury to derive a correct statement of an essential element from various fragments in the court's instructions is made quite plain when one focuses on the prejudice caused to this defendant by even the circuit panel's own rephrasing. For the panel placed emphasis on the trial court's having told the jury to convict if they found that Feldman had "intentionally participated in a scheme to procure money or property from Merrill Lynch by means of false pretenses or representations that were calculated to deceive." But, in the mail fraud context, "calcu-

lated to deceive" is not the equivalent of "intent to defraud."[7] And on the facts of this case, the jury could well have found intent to deceive without

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7. Despite the panel's emphasis, "calculated to deceive" does not translate into "intent to defraud." It is in part because not every deceit, false statement, or breach of fiduciary obligation gives rise to or works a criminal fraud that the "intent to defraud" element is essential. See, e.g., United States v. Bethea, 672 F.2d 407 (5th Cir. 1982); see also, United States v. NcNeive, 536 F.2d 1245 (8th Cir. 1976). In order to prove a mail or wire fraud violation, the government must show that the scheme was devised with the specific intent to defraud. E.g., United States v. Foshee, 569 F.2d 401 (5th Cir. 1978), cert. denied, 444 U.S. 1082 (1980); United States v. Brown, 540 F.2d 364 (8th Cir. 1976). The specific intent requirement is used to distinguish between actual fraud, which involves an intent to deceive where some risk of harm to the victim is contemplated, and constructive fraud, which involves a mere breach of a fiduciary or equitable duty where no harm is contemplated. United States v. Bethea, supra; see Epstein v. United States, 174 F.2d 754, 765-766 (6th Cir. 1949).

Moreover, the deceit that forms the basis of the fraud must go to the nature of the bargain. United States v. Regent Office Supply Co., 421 F.2d 1174, 1182

(footnote continued)

intent to defraud. The evidence as to Feldman's knowledge of the phony guarantee letters was slim and heavily impeached, and the jury could well have relied instead upon the almost uncontested evidence as to his non-disclosure of his partnership interest in the options account at Merrill Lynch. While that non-disclosure was alleged to be "part of" the scheme to defraud and could fairly be said to involve representations

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(2d Cir. 1970). Any nondisclosures or affirmative misrepresentations must be material, that is, some harm to the victim of the fraud at least must be contemplated. United States v. Bethea, supra; United States v. Ballard, 663 F.2d 534, 540-42 (5th Cir. 1981); United States v. Bronston, 658 F.2d 920, 927 (2d Cir. 1981), cert. denied, 456 U.S. 915 (1982); United States v. Rabbitt, 583 F.2d 1014 (8th Cir. 1978), cert. denied, 439 U.S. 1116 (1979); United States v. Dixon, 536 F.2d 1388, 1399 n.11 (2d Cir. 1976).

The Circuit panel recognized this fact by its suggestion that the misrepresentations concerning Feldman's interest in Joyner's account would not support a mail fraud conviction. Slip op. at 7.

"calculated to deceive," it did not constitute mail fraud for the very reason that there was no intent to defraud.

III. The "One or More" Instructions Which Permitted a Conviction Based on Conduct Beyond the Reach of the Mail and Wire Fraud Statutes

It contravenes the most fundamental values underlying our criminal justice system to permit a conviction for conduct that does not constitute a crime. The notion that a court or jury cannot convict a defendant for acts which Congress has not declared illegal is too well-rooted to be challenged. United States v. Eaton, 144 U.S. 677, (1892); United States v. Britton, 108 U.S. 199 (1883); United States v. Coolidge, 1 Wheat. (14 U.S.) 415 (1814); United States v. Hudson & Goodwin, 11 U.S. 32 (1812). Yet that is precisely the effect of the Seventh Circuit's ruling in this case.

The panel suggested that a verdict based solely on proof of Feldman's non-disclosure of his partnership interest in Western Investment Company would be invalid. And it acknowledged the settled principle that a verdict resting on two possible bases, one of which is invalid, may not stand.[8] However, the practical effect of the trial judge's confusing instruction is a verdict that may rest solely on such a finding. And the panel's reasoning that there was no practical possibility that the jury based its conviction solely on that basis cannot withstand close scrutiny.

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8. Yates v. United States, 354 U.S. 298, 311-312 (1957), overruled on a different point, Burks v. United States, 437 U.S. 1 (1978), on remand, 579 F.2d 1013 (6th Cir. 1978); Stromberg v. California, 283 U.S. 359 (1931); United States v. Ballard, 663 F.2d 534 (5th Cir. 1981); United States v. Baranski, 484 F.2d 556. 560-61 (7th Cir. 1973).

The trial court instructed the jury that

> [i]t is not necessary that the Government prove all of the false pretenses, representations and acts charged in the portion of the indictment describing the scheme. It is essential only that one or more of them be proved which shows the existence of the scheme to defraud. (Emphasis Added.)

Appendix F, p. 84a. These instructions were given despite defense counsel's objection that this charge might "mislead the jury into convicting if the government proves only one small allegation of the indictment, which is charged to have been part of the scheme." (R 373*) The impact, in this case, was devastating.

As Feldman argued vigorously in the Seventh Circuit, a substantial aspect of the scheme to defraud alleged in the indictment, barely contested (if at all) at trial yet dwelt upon at great length by the prosecutor, related to conduct

which, of itself, would not support a mail fraud conviction. That conduct related to Feldman's sharing an interest in a customer's account without disclosing that fact to his employer, Merrill Lynch. The Court agreed with the legal analysis Feldman presented, and indicated that, in this case, absent intent to defraud, that is, intent to cause some harm, and some actual risk of such harm, Feldman's concealed partnership interest in Western Investment Company would be a mere fiduciary breach not prosecutable under the mail fraud statute.[9] Yet the

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9. The opinion below contains a careful analysis of the critical importance of "intent to defraud" and the possibility of some actual harm to the alleged victim of the fraud. Slip op. at 6-7. The panel observed that an employee's failure to disclose information to his employer can only support a mail fraud conviction if "the non-disclosure could or does result in harm to the employer." Slip op. at 6. The panel further noted that while Merrill Lynch may have a reason for prohibiting account executives like Feld-

(footnote continued)

"one or more" language in this case permitted, indeed invited, the jury to convict based on that conduct alone.

The Seventh Circuit panel which decided this case attempted to salvage the erroneous jury instructions by, once again, substituting its own analysis of the indictment and the evidence for the express language of the charge, and by combining fragments from disparate portions of the charge. It observed that, as set forth in the indictment, the only purpose of the alleged scheme to defraud was "to induce Merrill Lynch to sell put options for the defendants without the

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man from sharing a financial interest in customers' accounts, "the government has produced no evidence that breach of this rule could have harmed Merrill Lynch." Slip op. at 7. If the guarantee letters were genuine -- and the polygraph examination demonstrated that Feldman believed they were -- then his mere failure to disclose to his employer his interest in Joyner's account posed no risk of harm to Merrill Lynch. See also, supra, fn. 7.

defendants producing the required margin." It noted that the jury was cautioned to convict the defendant "only of the scheme charged in the indictment." It then reasoned that, since it would not be possible as a matter of fact to fulfill the alleged purpose merely by concealing one's interest in a customer's account, a finding that Feldman knew that the guarantee letters were phony was necessarily implicit in any jury verdict of guilt. In other words, because the only alleged purpose of the scheme was to trade without collateral, and because there would be no trading without collateral were the letters genuine (since the genuine letters would provide the required collateral), and because the jury convicted, therefore, the jury must have expressly reasoned that Feldman had that

purpose and knew of the false guarantee letters.

This reasoning assumes that the jury substituted its own analysis of the indictment and of the evidence for the instructions expressly given by the trial judge. Further, it assumes that the jury's own independent reasoning was identical to that of the appellate judges. This Court has emphatically denounced just such reasoning:

> To say that the lay jury will know enough to disregard the judge's bad law if in fact he misguides them . . . would transfer to the jury the judge's function in giving the law and transfer to the appellate court the jury's function of measuring the evidence by appropriate legal yardsticks . . . [T]he question is not whether guilt may be spelt out of a record, but whether guilt has been found by a jury according to the procedure and standards appropriate for criminal trials in the federal courts.

Bollenbach v. United States, 326 U.S. 607, 613-614 (1946).

In fact, as guided by the instructions actually given here, the jury could have convicted Feldman without ever unanimously believing the critically important fact that Feldman knew the guarantee letters were false.

The jury was never told what the panel assumes as critical to its decision, that establishing beyond a reasonable doubt the facts relating to nondisclosure of Feldman's interest in Western Investment Company, would not suffice to convict, and that proof of his knowing involvement with the fraudulent guaranty letter was necessary to establish the government's case. On the contrary, the judge told the jury in so many words that the scheme alleged in the indictment could be proved by merely estab-

lishing "one" of the false pretenses, representations and acts charged in the portion of the indictment describing the scheme "which shows the existence of the scheme." Appendix F, p. 84a. The preponderance of those specific acts, spelled out in paragraphs of detail as "part of" the scheme to defraud, related not at all to the phony guarantee letters, nor even to the alleged overall "purpose" of the scheme, but only to Feldman's concealed interest in the Western Investment Company account, i.e., his breach of fiduciary duty to his employer.[10] Those specific acts, in sheer

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10. The indictment focused on the "silent partnership," with specific allegations that "part of the fraud on Merrill Lynch" included the preparation of the "partnership agreement dated June 10, 1977," naming Mr. Feldman's wife, Augusta, as a partner (¶ 10); the opening of a bank account for the partnership (¶ 11); the opening of the Merrill Lynch margin account for the partnership (¶ 12); the filing of a partnership

(footnote continued)

volume and detail, quite overshadowed the few words in the indictment summarizing the purpose of the scheme, upon which the panel placed such emphasis. The prosecutors, also, repeatedly and with memorable emphasis, described these acts as "a fraud on Merrill Lynch." See fn. 2, supra. It defies common sense to assume that the jury placed as much emphasis as the Circuit decision supposes on the few words in the indictment describing the scheme's purpose, and viewed all the specific misrepresentations set out in the indictment and hammered home by the prosecutors as subordinate to that purpose.

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agreement with Merrill Lynch naming only the Joyners as partners and deleting any reference to Mr. Feldman or his wife (¶ 14); the receipt and deposit of premium checks from Merrill Lynch into the partnership bank account (¶ 26); and the drawing of checks from that bank account to Mr. Joyner and Mr. Feldman's wife (¶ 21).

In speculating that no juror could have been misled into convicting Mr. Feldman solely for the part of the fraud involving the non-disclosure of his interest in Joyner's account, the Court below relied on a separate instruction in which the jurors were advised that they could only convict the defendant "of the scheme charged in the indictment" and that a finding that he had "violated the practices and procedures of Merrill Lynch," alone, was not sufficient to convict. The panel failed to appreciate the critical fact that the trial judge had already informed the jury that the allegations in the indictment -- including multiple claims concerning Feldman's non-disclosure of his interest in Joyner's account -- did constitute a scheme

to defraud, thus impermissibly directing a verdict in that respect.[11]

In a somewhat comparable case, Judge Rubin, writing for the Fifth Circuit held that, since breach of a fiduciary duty,

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11. Furthermore, there was no evidence that Feldman's failure to disclose his interest in Joyner's account "violated the practices and procedures of Merrill Lynch." Although there was testimony that Merrill Lynch had a policy against sharing the profits or losses of an account with a customer (R.264) the prosecutor's summation references to violations of Merrill Lynch's "practices and procedures" referred to totally different conduct concerning the manner of exercising options and filing guarantee letters (R.403-04). Thus, it is hard to speculate, let alone conclude, that the trial court's instruction regarding Merrill Lynch's practices and procedures referred in any way to the non-disclosure of Mr. Feldman's interest in Joyner's account. On the other hand, this non-disclosure was clearly alleged to be part of the scheme to defraud and therefore properly the basis for conviction under the very instruction on which the panel relies. Moreover, the prosecutors' closing arguments repeatedly characterized Mr. Feldman's acts and representations in failing to disclose his interest in Joyner's account as "a fraud on Merrill Lynch" (R.388-92, 395).

standing alone, is insufficient to establish a mail fraud violation,

> [t]he charge should specifically inform the jury that the violation of a fiduciary duty, through an act of fraud within the meaning of the statute, must be coupled with the additional findings that the defendant devised a scheme to defraud and did so with specific intent to defraud. (Emphasis added.)

United States v. Goss, 650 F.2d 1336, 1346 (5th Cir. 1981). The Circuit Court in Goss reversed, despite the fact that each of the elements of the offense had been presented to the jury (as was not the case here), because

> Although the trial judge did, before giving the fiduciary duty charge, instruct the jury on the requisite elements of a mail fraud violation, the fiduciary duty instruction was couched in language susceptible to a jury interpretation that, if they found that Benson had breached his fiduciary obligation, that was the end of the inquiry. The trial judge's instruction was itself so deficient as to constitute reversible error. 650 F.2d at 1346-47.

At best, the instruction concerning Merrill Lynch's practices and procedures, to the extent it can be deemed inconsistent with the "one or more" language, was confusing, not curative. Where two instructions are given which are in direct conflict with each other, one of which is erroneous and might have been followed by the jury, the giving of such instructions is generally said to be prejudicial.[12]

"The jury should not be required to determine which part of a contradictory charge is correct." Polansky v. United States, 332 F.2d 233, 236 (1st Cir. 1964).

The trial court here persisted, over defense objection, in giving an instruction which - under all the circumstances

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12. Mills v. United States, 164 U.S. 644 (1897); Smith v. United States, 230 F.2d 935, 939 (6th Cir. 1956); Frank v. United States, 220 F.2d 559, 565 (10th Cir. 1955); Nicola v. United States, 72 F.2d 780, 787 (3d Cir. 1934).

-- permitted jurors to convict for conduct that does not violate the law.

IV. The Directed Verdict as to the Existence of the Scheme to Defraud

The Seventh Circuit, in its effort to salvage the jury instructions, as to each of the issues argued to that Court, gave great weight to the fact that the trial judge told the jury to convict only if they found that the government had proved "the scheme to defraud charged in the indictment." These words, which are used as the primary vehicle to affirm the conviction, themselves contain one of the crucial errors in the trial court's charge. For, in effect, they direct a verdict as to one essential element of the offense, that is, the existence of the scheme to defraud.[13] This error

13. Several cases expressly hold that it is plain error to direct a verdict as to any fact necessary for conviction. United States v. Musgrave, 444 F.2d 755 (5th (footnote continued)

infected the entire charge, for it interplayed with each of the other errors to exacerbate the harm.

It is universally recognized that the first element of the offense of mail fraud is the existence of a scheme to defraud. This Court has articulated the elements as follows: "The elements of the offense of mail fraud ... are (1) a scheme to defraud, and (2) the mailing of a letter, etc., for the purpose of executing the scheme." Pereira v. United States, 347 U.S. 1, 8, 9 (1954). Essentially the same descriptions have been

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Cir. 1971), cert. denied, 414 U.S. 1023 (1973); United States v. Ragsdale, 438 F.2d 21, 27 (5th Cir.), cert. denied, 403 U.S. 919, 91 S.Ct. 2231, 29 L.Ed.2d 696 (1971) ("This Circuit is firmly committed to what appears to be the universal rule, that no matter how conclusive the evidence, a court may not direct a verdict of guilty in whole or in part . . . Any such instruction would amount to plain error which would be noticed, even though not assigned.").

spelled out in numerous cases at the Circuit level.[14]

The Government has the burden of proving to the satisfaction of a properly instructed jury not only the underlying facts of the conduct constituting the alleged scheme, but also the character of that conduct as a scheme to defraud.

The issue whether particular conduct constitutes a scheme to defraud within the meaning of the statute is not always an easy or simple one, as is evidenced by

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14. See, e.g., Northcraft v. United States, 271 F.2d 184, 187 (8th Cir. 1959); Milam v. United States, 322 F.2d 104, 109 (5th Cir. 1963), cert. denied sub nom.; Kimball v. United States (1964) 377 U.S. 911; United States v. Shavin, 287 F.2d 647, 649-650 (7th Cir. 1961); Dranow v. United States, 307 F.2d 545, 557 (8th Cir. 1962); United States v. Houlihan, 332 F.2d 8, 13 (2d Cir.) cert. denied, 379 U.S. 828 (1964); United States v. Dreer, 457 F.2d 31,33 (3d Cir. 1972); United States v. Pisciotta, 469 F.2d 329,330 (10th Cir. 1972); United States v. Maze, 468 F.2d 529, 532 (6th Cir. 1972), judgment aff'd 414 U.S. 395 (1974); United States v. Brewer, 528 F.2d 492,494 (4th Cir. 1975).

the extensive debate in recent years as to the very scope of that statute.[15] However, even in the most complex and sophisticated cases, the question is always to be submitted to the jury, upon appropriate instructions as to the mean-

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15. See, e.g., United States v. Bohonus, 628 F.2d 1167 (9th Cir.), cert. denied, 447 U.S. 928 (1980); United States v. Bush, 522 F.2d 641 (7th Cir. 1975); United States v. George, 477 F.2d 508 (7th Cir.), cert. denied 414 U.S. 827 (1973); United States v. Margiotta, 688 F.2d 108 (2d Cir. 1982); United States v. Bronston, 658 F.2d 920 (2d Cir. 1981), cert. denied, 456 U.S. 915 (1982); United States v. Von Barta, 635 F.2d 999 (2d Cir. 1980), cert. denied, 450 U.S. 998 (1981). These cases have interpreted federal mail fraud law to encompass deprivation of so-called "intangible rights" and in so doing have extended mail fraud law to cover fact patterns hitherto unexamined by the courts. Coffee, J., From Tort to Crime: Some Reflections on the Criminalization of Fiduciary Breaches and the Problematic Line Between Law and Ethics 19 Amer. Cr. L. Rev. 116 (1981); Coffee, J., The Metastasis of Mail Fraud: The Continuing Story of the "Evolution" of A White-Collar Crime, 21 Amer. Cr. L. Rev. 1 (1983).

ing of the term "scheme to defraud." Thus, for example, in United States v. Bush, 522 F.2d 641 (7th Cir. 1975), cert. denied, 424 U.S. 977 (1976), a complex mail fraud case involving alleged failure of a government official to provide "honest and faithful services" and alleged concealment of the defendant's interests in a contract with the city government, the District Court expressly instructed the jury that it had to find that the proven conduct constituted a scheme to defraud. 522 F.2d at 651 and n.10.

This principle permeates all of criminal procedure. Only where an aspect of what the Government must prove relates to an essentially jurisdictional or peculiarly legal question can it be determined by the Court as a matter of law. Where, as here, the fact goes to the essence of the offense, even if it is not

disputed by the parties, the trial judge errs in withdrawing it from the jury's express consideration, for the effect of such action is to deprive the defendant of a trial by jury. See, United States v. Manuszak, 234 F.2d 421 (3d Cir. 1956).[16] The mere fact that an indict-

16. Compare, United States v. Guy, 456 F.2d 1157 (8th Cir.) (obligations of the United States as a matter of law), cert. denied, 409 U.S. 896 (1972); United States v. Morris, 451 F.2d 969, 972-73 (8th Cir. 1971) ("in federal custody" as a matter of law); United States v. Briddle, 443 F.2d 443, 447 (8th Cir.) (property of the United States as a matter of law), cert. denied, 404 U.S. 942, (1971); United States v. Jackson, 436 F.2d 39, 41-42 (9th Cir. 1970) (government property as a matter of law), cert. denied, 403 U.S. 906, (1971); United States v. Parisi, 365 F.2d 601 (6th Cir. 1966) (bonded warehouse as a matter of law), vacated on other grounds sub nom. O'Brien v. United States, 386 U.S. 345, (1967); Guy v. United States, 336 F.2d 595, 597 (4th Cir. 1964) (per curiam) (apparatus was a still as a matter of law); with, United States v. Heller, 635 F.2d 848, 856-57 (Em. App. 1980) (court could not instruct jury that comparability of outlet had been established as a matter of law); United States v. Benedetto, 558 F.2d 171, 176-77 (3d Cir. 1977) (court (footnote continued)

ment can survive a motion to dismiss for failure to allege an offense, or that the defendant's motions at the close of the case may be denied, cannot be enough. The jury, in our system of justice, must ultimately determine whether the conduct proved has met the legal standards to support conviction.

But in Feldman's case, the trial court told the jury that to convict it must find, not that the defendant participated in a scheme to defraud, but that he participated in the scheme to defraud alleged in the indictment. The definition of "scheme to defraud" which

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could not instruct jury that loans were "loanshark loans" as matter of law); Greenfield v. United States, 341 F.2d 411, 412-13 (D.C. Cir. 1964) (per curiam) (court could not instruct jury that pop bottle was dangerous weapon as matter of law); DeCecco v. United States, 338 F.2d 797, 798 (1st Cir. 1964) (court could not instruct jury that defendant had failed to pay wagering tax as a matter of law).

followed at a somewhat later point in the instructions thus served, not as a standard by which to judge the government's proof, but as mere descriptive language essentially elaborating for the jury on the conclusion the judge had already presented to them, that if they found that the defendant intentionally performed the alleged acts, a scheme to defraud would have been established.

The variation between the words "a scheme to defraud" and "the scheme to defraud alleged in the indictment" is thus no mere inconsequential nuance. And the effects of this error permeated the entire charge, to the grave prejudice of this defendant. In combination with the other errors in the charge, the harmful effects take on even greater proportions; once the jury was instructed to focus solely on the issue whether the defendant

intentionally committed the particular acts charged in the indictment (with no reference to the specific intent criterion) and, then, that commission of only "one" such act would be a sufficient basis for conviction, its verdict was virtually a foregone conclusion.

V. The Cumulative Effect of the Individual Errors

The jury instructions in this case contain gravely prejudicial errors which justify reversal of the resulting conviction and explicit guidelines for the district court concerning the indispensable ingredients of the charge in such a case.

Individually, each of these instructions is offensive to Due Process. In combination, they constitute a substantial departure from the standards of procedure which should govern criminal trials in the Federal Courts. In the fast-moving area of developing mail fraud

law, the Seventh Circuit has enunciated for the district courts a standard for jury instructions which opens the door to serious future abuses, inadvertent though they may be.

The severe prejudice to the defendant in this case only exemplifies the fundamental principle that clear and concise instructions as to each essential element of the charged offenses should be given in every criminal case tried in the Federal Courts.

> If justice is to be done in accordance with the rule of law, it is of paramount importance that the court's instructions be clear, accurate, complete and comprehensible, particularly with respect to the essential elements of the alleged crime that must be proved by the Government beyond a reasonable doubt.

United States v. Clark, 475 F.2d 240, 248 (2d Cir. 1973). As Judge Swygert noted in dissenting from a Seventh Circuit

opinion "'[t]he desire of a careful judge to avoid language which to him may seem unnecessarily repetitive should yield to the paramount requirement that the jury in a criminal case be guided by instructions framed in language which is unmistakably clear.'" United States v. Johnson, 605 F.2d 1025, 1031-32 (7th Cir. 1979), cert. denied, 444 U.S. 1033 (1980) quoting United States v. Corrigan, 548 F.2d 879, 883 (10th Cir. 1977).

To permit this conviction to stand, on the basis of the Seventh Circuit's opinion in this case, would sanction an injustice to this defendant and leave the district judges in every circuit in doubt as to required instructions in mail and wire fraud cases.

CONCLUSION

For the reasons stated herein, this petition for a writ of certiorari should be granted.

Respectfully submitted,

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APPENDIX A

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

UNITED STATES OF AMERICA	)	
	)	
v.	)	No. _____
	)	Violations:
DAVID A. FELDMAN	)	Title 18,
and GEORGE EDGAR	)	United States
JOYNER	)	Code,
	)	Sections
	)	1341 and 1343

The SPECIAL MARCH 1981 GRAND JURY charges:

1. At all times material herein, David Feldman, defendant herein, was a stock broker and branch manager of the Hollywood, California, office of Merrill Lynch, Pierce, Fenner and Smith, Incorporated (hereinafter referred to as Merrill Lynch).

2. At all times material herein, Merrill Lynch was a stock brokerage corporation with its main office in New York and branch offices doing business in

the Northern District of Illinois, the State of California, and elsewhere.

3. At all times material herein, a "put" was a stock option which gave the option buyer the right, during a specified period of time, to sell particular stock to the option seller at a fixed price. The buyer of a put option paid the seller a premium for the option.

4. At all times herein, Merrill Lynch was authorized to buy and sell stocks and stock options for its customers on the American Stock Exchange, the Chicago Board Options Exchange, the Pacific Stock Exchange, the Midwest Stock Exchange, and the Philadelphia, Baltimore, and Washington Stock Exchange.

5. At all times material herein, it was standard business procedure for Merrill Lynch to execute a customer's order to buy or sell stock options in the following manner: The branch office receiv-

ing the order would record the transaction on an order ticket and forward the order by wire to the city where the appropriate exchange is located. A representative of Merrill Lynch on the exchange floor would execute the order. The exchange then would send a confirmation by wire to the originating office, which would forward the confirmation to its customer.

6. At all times material herein, Merrill Lynch was required to maintain margin (cash or collateral in such forms as bank guarantee letters) sufficient to insure that Merrill Lynch had available financial resources to purchase the stock subject to put options that they had sold, in the event these put options were exercised.

7. At all times material herein, Merrill Lynch required customers who sold put options through Merrill Lynch to

maintain margin (cash or collateral in such forms as bank guarantee letters) sufficient to insure that the customer had available financial resources to purchase any stocks subject to these put options, in the event the put options were exercised.

8. Beginning in or about the summer of 1977, and continuing thereafter up to and including March 1978, at Chicago in the Northern District of Illinois, Eastern Division, and elsewhere,

DAVID A. FELDMAN and
[GEORGE EDGAR JOYNER,

defendants herein, devised and intended to devise a scheme and artifice to defraud and for obtaining money and property from Merrill Lynch by means of false and fraudulent pretenses, representations and promises; the defendants well knowing at the time that said pretenses, representations and promises would be and were

false and fraudulent when made, which scheme and artifice to defraud was in substance as follows:

9. The purpose of the scheme and artifice to defraud was to induce Merrill Lynch to sell put options for the defendants without the defendants producing the required margin. The defendants submitted false and fraudulent bank guarantee letters to fulfill their margin requirements. In reliance on these letters, Merrill Lynch sold put options for the defendants and the defendants received approximately $362,800 in premiums from Merrill Lynch for the put options sold.

10. It was part of said scheme and artifice to defraud that David A. Feldman and George Edgar Joyner, defendants herein, caused a partnership agreement dated June 10, 1977, to be prepared. Said partnership agreement named George

Edgar Joyner, Mary C. Joyner (George Edgar Joyner's wife), and Augusta Feldman (David A. Feldman's wife), as partners in Western Investment Company for the purpose of investments in marketable securities, options, bonds, and real estate. This included investments made on margin, in addition to cash transactions.

11. It was further a part of said scheme and artifice to defraud that on or about August 10, 1977, the defendants opened and caused to be opened business checking account number 78-33148 in the name of Western Investment Company at Continental Bank, Chicago, Illinois.

12. It was further a part of said scheme and artifice to defraud that on or about September 9, 1977, the defendants opened and caused to be opened margin accounts number 220-07013 and 220-07014 in the names of Western Investment Company, George Edgar Joyner, and Mary C. Joyner,

at Merrill Lynch for the purpose of purchasing and selling put options.

13. It was further a part of said scheme and artifice to defraud that defendant David Feldman, as an employee of Merrill Lynch, would and did manage these accounts and personally wrote all orders to buy and sell puts in these accounts.

14. It was further a part of said scheme and artifice to defraud that the defendants caused a partnership agreement dated June 10, 1977, to be filed with Merrill Lynch. Said partnership agreement named George Edgar Joyner and his wife, Mary C. Joyner, as partners in Western Investment Company. This agreement was substantially identical to the partnership agreement described in paragraph 10, except that Augusta Feldman (David Feldman's wife) was not named in, and did not sign, the agreement.

15. It was further a part of said scheme and artifice to defraud that after Harris Trust and Savings Bank, Chicago, Illinois (hereinafter referred to as Harris Bank) refused to issue letters guaranteeing credit to Western Investment Company as margin (collateral) for put options which Western Investment Company intended to sell to buyers, the defendants issued and caused to be issued counterfeit guarantee letters on counterfeit Harris Trust and Savings Bank letterhead. Said guarantee letters falsely represented to Merrill Lynch that Harris Bank had certain sums of money on deposit in the account of Western Investment Company which would be held for Merrill Lynch as margin (collateral) for certain put options sold by Western Investment Company. Merrill Lynch required said guarantee letters as a prerequisite to executing the transactions

so that they could seek payment from Harris Bank for that transaction if the Western Investment Company accounts were debited beyond the cash available in said accounts.

16. It was further a part of said scheme and artifice to defraud that the defendants would and did misrepresent to Merrill Lynch that these guarantee letters were valid so that Merrill Lynch would rely on these guarantee letters as satisfying its margin requirements governing the execution of the put options transactions requested by the defendants. When Merrill Lynch discovered that the bank guarantee letters were fraudulent, it was required to buy back approximately $300,000 of the put options sold for the defendants so that they would not be in violation of their margin requirements.

17. It was further a part of said scheme and artifice to defraud that the

defendants issued and caused to be issued tickets which were wired to various stock exchanges including Chicago, Illinois; Los Angeles, California; Philadelphia, Pennsylvania; and New York, New York, which authorized stock brokers to sell put options on behalf of Western Investment.

18. It was further a part of said scheme and artifice to defraud that premiums received by Western Investment Company in return for selling put options were credited to the Western Investment Company accounts at Merrill Lynch.

19. It was further a part of said scheme and artifice to defraud that the defendants caused Merrill Lynch to send brokerage statements to Western Investment Company, attention George Edgar Joyner, 332 Branchwood Court, Schaumburg, Illinois 60193.

20. It was further a part of said scheme and artifice to defraud that the defendants caused Merrill Lynch to issue premium checks for put option transactions to Western Investment Company in Schaumburg, Illinois, which checks were deposited into Western Investment Company account number 78-33148, at Continental Bank, Chicago, Illinois.

21. It was further a part of said scheme and artifice to defraud that the defendants caused checks to be drawn from account number 78-33148 which were made out to Augusta R. Feldman and G.E. Joyner, defendant herein, in equal amounts.

22. It was further a part of said scheme and artifice to defraud that in or about January 1978, the defendants contracted and caused to be contracted Kay Services Company, a telephone answering and mail receiving service, to answer calls and receive mail in the name of

Albert R. Cooke, Vice President, H.S.T. Options, Room 1161, 171 West Monroe Street, Chicago, Illinois.

23. It was further a part of said scheme and artifice to defraud that David Feldman, defendant herein, directed Merrill Lynch to send all Western Investment Company correspondence to Albert Cooke, H.T.S. Options, Room 1161, 171 West Monroe Street, Chicago, Illinois.

24. On or about the dates listed below in the Northern District of Illinois, Eastern Division and elsewhere,

DAVID A. FELDMAN and
GEORGE EDGAR JOYNER,

defendants herein, for the purposes of executing the aforesaid scheme and artifice to defraud and attempting to do so, knowingly caused the envelopes listed below to be delivered according to the directions thereon by the United States Postal Service, each such use of the

mails being a separate count of this indictment:

There following nineteen (19) counts alleging separate mailings of checks in violation of Title 18, United States Code, Section 1341.

COUNTS TWENTY THROUGH TWENTY-EIGHT

The SPECIAL MARCH 1981 GRAND JURY further charges:

1. The Grand Jury realleges and incorporates by reference Paragraphs 1 through 23 of Counts One through Nineteen of this Indictment as though fully set forth herein.

2. On or about the dates listed below in the Northern District of Illinois, Eastern Division, and elsewhere,

DAVID A. FELDMAN and
GEORGE EDGAR JOYNER,

defendants herein, for the purpose of executing the aforesaid scheme and artifice to defraud and obtain money and

property by means of false and fraudulent pretenses, representations and promises and attempting to do so, transmitted and caused to be transmitted by means of wire in interstate commerce, certain writings, signs, signals and sounds, to wit: the wiring of the "put" option tickets listed below, written on the Western Investment ompany account, from Merrill Lynch, Hollywood, California, to the Chicago Board Options Exchange and Midwest Stock Exchange in Chicago, Illinois, each such use of the wires being a separate count of this indictment:

There followed nine(9) counts alleging separate instances of wire transmittals

in violation of Title 18, United States Code, Section 1343.

A TRUE BILL:

FOREPERSON

ACTING UNITED STATES ATTORNEY

APPENDIX B

In the

United States Court of Appeals

For the Seventh Circuit

No. 82-1611

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

v.

DAVID A. FELDMAN,

Defendant-Appellant.

Appeal from the United States District Court for the Northern District of Illinois, Eastern Division.
No. 81 CR 696—Charles P. Kocoras, *Judge.*

ARGUED JANUARY 7, 1983—DECIDED JUNE 29, 1983

Before PELL and ESCHBACH, *Circuit Judges*, and NEAHER, *Senior District Judge.**

ESCHBACH, *Circuit Judge.* David A. Feldman appeals his conviction on nineteen counts of mail fraud and nine counts of wire fraud, all stemming from an alleged scheme to defraud Merrill Lynch, Pierce, Fenner and Smith, Inc. ("Merrill Lynch") by using false bank guarantee letters to fulfill the collateral requirements for trading in stock options. For the reasons below, we affirm.

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* The Honorable Edward R. Neaher, Senior District Judge for the Eastern District of New York, sitting by designation.

I

According to the evidence taken in the light most favorable to the government, David A. Feldman and George Edgar Joyner executed false bank guarantees which enabled them to trade in stock options through Merrill Lynch without providing the collateral Merrill Lynch required to ensure that any options that were exercised would be covered.

Feldman and Joyner were neighbors in early 1977 when Feldman was employed with Merrill Lynch in Chicago and Joyner, a certified public accountant, was a controller for Brinks Incorporated. After discussing the options market on several occasions, they entered into an investment partnership in which each had a fifty percent interest. The written partnership agreement was later changed, omitting references to Feldman's interest and showing the two partners as Joyner and his wife, because Merrill Lynch's policy prohibited account executives from having a financial interest in a customer's account. Nevertheless, throughout the duration of the partnership, Feldman and Joyner split evenly all profits and expenses.

In March 1977, Feldman was transferred to Hollywood, California, where he became Branch Manager. Feldman continued his contacts with Joyner regarding options trading, and in July 1977, came to Chicago where Joyner introduced him to Harold Dillenbach, Joyner's banker at Harris Trust and Savings Bank. Feldman explained their plan to trade in "put" options, *i.e.*, options to sell, and requested that the bank provide them with guarantee letters to satisfy Merrill Lynch's collateral requirement. When Feldman left Chicago after the meeting, the prospects for bank guarantees did not seem promising.

After Harris Trust and Savings informed Joyner that it would not provide guarantee letters, Feldman sent Joyner a blank guarantee form, which Joyner overlaid with a Harris letterhead. Joyner photocopied the composite, filled it out to make it appear that Harris had

issued the guarantee in the amount of $1 million, and sent it to Feldman. Feldman then opened two accounts for the partnership and began selling puts. The accounts, in the name of Western Investment Company, did not reflect Feldman's financial interest.

In August 1977, Joyner opened a checking account for Western Investment at a bank in Chicago. Joyner, his wife and Feldman's wife were authorized to write checks on the account. Proceeds from the partnership's options trading were deposited in this account and expenses of the partnership were paid from the account.

In September 1977, Merrill Lynch required separate guarantees for each transaction rather than simply a blanket guarantee. Joyner used the same method he employed for the blanket guarantee to produce the first few separate guarantees, but Feldman suggested Joyner produce more professional looking letters. Joyner therefore had a professional print guarantee letters purporting to come from an Albert Cooke, vice president of "HTS Options." The address and phone number printed on the letters were actually those of an answering service, which Joyner had employed to answer calls and receive mail. These actions were prompted by Feldman's concern that internal auditors from Merrill Lynch might check into Western Investment's accounts.

Feldman took special care to see that correspondence from Merrill Lynch was addressed to "HTS Options" rather than to "Harris Trust and Savings." Nevertheless, in late February 1977, when he was out of town, a letter was addressed to Harris Trust and Savings and was delivered to that institution rather than to the HTS Options maildrop. Officers at Harris immediately recognized that the enclosed expired guarantee letter did not originate from Harris and began an investigation. Harris officials notified the Merrill Lynch office in New York of the irregularities and arranged to meet with Joyner on February 24, 1977.

On Feburary 22, 1977, Feldman learned from the Hollywood Operations Manager that there was a prob-

lem with the Western Investment accounts. Feldman arranged to meet with Joyner at O'Hare airport early on February 24, 1977. There they exchanged checks in order to arrange funds to repay Merrill Lynch the funds it had advanced to Western Investment Company. Feldman expressed his hope that the repayment would put an end to the matter, and assured Joyner that "[n]obody is going to jail." Feldman advised Joyner to say as little as possible to the officials of Harris Trust and Savings and to try to "cover it up."

Later that day, Joyner met with Dillenbach and other Harris officials. Joyner attempted to convince them that the fictitious Mr. Cooke did indeed exist, that the mailing to Harris was just a mistake and that Merrill Lynch in California was taking care of the whole matter. The Harris officials were unconvinced and told Joyner that they intended to notify certain agencies, including the United States government, of the recent events.

Joyner conferred with Feldman again, who advised him to get an attorney and destroy all papers. Joyner, however, did not destroy the partnership and financial documents.

On March 9, 1978, Joyner was interviewed by a Special Agent of the Federal Bureau of Investigation, at which time he admitted to the scheme to deceive Merrill Lynch. In 1980, Joyner entered into a plea agreement with the government whereby he would plead guilty to one count of mail fraud and one count of wire fraud and give truthful testimony at Feldman's trial in exchange for the government's making his cooperation known to the court at sentencing.

At the time the fraudulent scheme was discovered, the value of outstanding options in the Western Investment accounts was $290,000. Merrill Lynch was forced to liquidate the accounts because without sufficient collateral, they were in violation of federal securities laws. At the time of trial, there was still approximately $100,000 owing on the accounts.

Feldman was indicted in November 1981 on nineteen counts of mail fraud and nine counts of wire fraud in violation of 18 U.S.C. §§ 1341 and 1343. At a jury trial which spanned five days, the defendant presented no defense, but attempted to introduce the results of a polygraph examination. The theory of the defense, as expounded in the opening statement and in closing argument, was that the government's evidence showed only that Feldman had an improper financial interest in the Western Investment accounts, but that the government had failed to prove that Feldman knew that the guarantee letters were falsified. On February 22, 1982, the jury found Feldman guilty of all counts. Feldman appeals.

II

Feldman raises several issues on appeal. He first contends that the indictment, the government's argument and the jury instructions were faulty because they allowed the jury to convict Feldman of mail and wire fraud even if the jurors were convinced only that he had concealed his financial interest in the Western Investment accounts and were not convinced that Feldman knew that the guarantee letters were false. Feldman next contends that the jury was not properly instructed that it must find that Feldman had specific intent to defraud. His third claim is that the court erred in allowing into evidence Joyner's prior consistent statement to the FBI regarding the scheme. Feldman finally contends that the court erred in refusing to admit into evidence the results of the polygraph test he attempted to introduce.

III

A. *The Necessity of Finding that Feldman Knew that the Guarantee Letters Were False*

Feldman contends that the indictment was written so that it could be read as charging two schemes, one involving concealment of his financial interest in the Western Investment accounts and one involving the use

of falsified guarantee letters. He claims that this, coupled with the government's closing argument characterizing the concealment as fraud on Merrill Lynch and jury instructions to the effect that the government need not prove all of the false representations in the indictment, allowed the jury to convict him of mail and wire fraud based on mere concealment of his financial interest. He contends that this, by itself, would not support a conviction of mail or wire fraud.

It is well established that a scheme which deprives an employer of the honest and faithful services of an employee or the right to have his business conducted in an honest manner can constitute a scheme to defraud under the mail fraud statute. *See United States v. Bohonus*, 628 F.2d 1167, 1172 (9th Cir.), *cert. denied*, 447 U.S. 928 (1980); *United States v. Bryza*, 522 F.2d 414, 422 (7th Cir. 1975), *cert. denied*, 426 U.S. 912 (1976); *United States v. George*, 477 F.2d 508, 513 (7th Cir.), *cert. denied*, 414 U.S. 827 (1973). Yet not every breach of duty by an employee works as a criminal fraud, *see id.* at 512, and receipt of secret profits, standing alone, cannot support a mail fraud conviction, *see United States v. Bohonus, supra*, 628 F.2d at 1172. Such activities must be accompanied by a scheme formed with the intent *to defraud. See id.* When an employee breaches a fiduciary duty to disclose information to his employer, that breach of duty can support a mail or wire fraud conviction only if the nondisclosed information was material to the conduct of the employer's business and the nondisclosure could or does result in harm to the employer.[1] *See United States v. Ballard*, 663 F.2d 534, 540-41 (5th Cir. 1981), *modified*, 680 F.2d 352 (1982); *United States v. Bronston*, 658 F.2d 920, 926 (2d

[1] While most of the cases we cite involve mail rather than wire fraud, the wire and mail fraud provisions are similar and cases construing the mail fraud statute are also applicable to the wire fraud statute. *See United States v. Computer Sciences Corp.*, 689 F.2d 1181, 1188 n.14 (4th Cir. 1982), *cert. denied*, 103 S. Ct. 729 (1983); *United States v. Giovengo*, 637 F.2d 941, 944 (3d Cir. 1980), *cert. denied*, 450 U.S. 1032 (1981).

Cir. 1981), *cert. denied*, 456 U.S. 915 (1982). Thus mail fraud indictments or convictions have been upheld where a defendant concealed from his firm's clients his promotion of a competitor's interests, *id.* at 927, where a defendant securities salesman failed to warn his employer that certain accounts were undercapitalized, *United States v. Von Barta*, 635 F.2d 999, 1007 (2d Cir. 1980), *cert. denied*, 450 U.S. 998 (1981), and where a defendant employee was receiving kickbacks which might have caused the employer to pay a higher price than necessary for certain items, *United States v. George*, *supra*, 477 F.2d at 513-14. In contrast, mail fraud convictions were reversed where a defendant employee was receiving secret profits and his employer was already making the maximum profit allowed by law, *United States v. Ballard*, *supra*, 663 F.2d at 541, and, in a slightly different context, where the defendant president of a corporation failed to list certain personal loans from the corporation on a proxy statement in connection with the election of an unopposed slate of directors, *United States v. Dixon*, 536 F.2d 1388, 1399-1400 (2d Cir. 1976).

While Merrill Lynch no doubt has a reason for prohibiting account executives from sharing a financial interest in customers' accounts, the government has produced no evidence that breach of this rule could have harmed Merrill Lynch. On the other hand, the active concealment of such an interest does render an employee's services less than totally honest and faithful. If we were convinced that Feldman's nondisclosure of his interest in Western Investment Company, standing alone, could not support a mail or wire fraud conviction, and if we believed that the jury might have convicted Feldman on this basis alone, the convictions could not stand. When a verdict may have rested on any of several grounds, one of which was improper, the conviction cannot be upheld. *Stromberg v. California*, 283 U.S. 359, 368 (1931); *United States v. Baranski*, 484 F.2d 556, 560-61 (7th Cir. 1973). However, we are convinced that neither the indictment, the government's argument, nor the jury instructions could have misled the jury into convicting on this basis.

Inclusion in the indictment of Feldman's concealment of his interest in the Western Investment accounts was proper, because this was part of an overall scheme to defraud. Not all aspects of a scheme need be illegal if considered separately; rather, it is sufficient that the scheme as a whole involves fraudulent conduct. *United States v. Keane*, 522 F.2d 534, 544 (7th Cir. 1975), *cert. denied*, 424 U.S. 976 (1976). While the indictment does detail Feldman's nondisclosure of his interest in the accounts, this is set in the context of describing the particulars of "a scheme or artifice to defraud," the purpose of which was to "induce Merrill Lynch to sell put options for the defendants without the defendants producing the required margin . . . ." This was the sole purpose described by the indictment, so that the conviction under the indictment must have entailed a finding that Feldman was involved with the falsified guarantee letters. Simply concealing his interest in the accounts would not enable him to trade in options without advancing sufficient collateral. We conclude that the indictment charged a single scheme to defraud, which by its terms could not mislead the jury into convicting solely on finding that Feldman concealed his interest in the accounts.

Feldman argues that comments by the government during closing argument could have misled the jury into convicting on improper grounds. While the government did characterize Feldman's concealment of his interest in Western Investment Company as "a fraud on Merrill Lynch," the government also stated at the outset that "[t]he bottom line on this scheme is playing with the house's money . . . . [Joyner and Feldman] did not put up one thin dime to trade nearly $2 million worth of options." Moreover, although the government referred to the nondisclosure as fraud several times during argument, Feldman made no objection to any of these references until his Motion for a New Trial. In these circumstances, and because the jury was properly instructed on the issue, we find no reversible error in the government's argument.

The court instructed the jury that "[i]t is not necessary that the Government prove all of the false pretenses, representations and acts charged in the portion of the indictment describing the scheme. It is essential only that one or more of them be proved which shows the existence of the scheme to defraud." Feldman contends that because several of the false pretenses charged in the indictment dealt only with concealment of his interest in the Western Investment accounts, this instruction allowed the jury to convict him solely on this basis. This court has already given qualified approval to a similar instruction, even though we suggested that a modification might be appropriate to ensure that the jury does not believe that it *must* find that there was a scheme to defraud if it found *any* of the allegations of the indictment to be proven. *See United States v. Joyce*, 499 F.2d 9, 22-23 (7th Cir.), *cert. denied*, 419 U.S. 1031 (1974). In the instant case, any possibility of jury confusion on this point was dispelled by the court's instruction that "[y]ou may only convict the defendant of the scheme charged in the indictment. Should you find that the defendant violated the practices and procedures of Merrill Lynch, Pierce, Fenner & Smith, this alone is not sufficient to convict the defendant of the scheme charged in the indictment." Evaluating the jury instructions as a whole, *United States v. Johnson*, 605 F.2d 1025, 1027 (7th Cir. 1979) (*en banc*), *cert. denied*, 444 U.S. 1033 (1980), we find that the jury could not have been misled into convicting Feldman solely for his nondisclosure of a financial interest in a customer's account.

Because we conclude that conviction necessarily rested on a finding that Feldman was involved in falsifying the guarantee letters, we need not decide whether Feldman's nondisclosure of his interest in a customer's account could have independently supported a mail or wire fraud conviction.

B. *Instructions on Specific Intent*

An essential element of a mail or wire fraud violation is specific intent to defraud. *See United States v. Keane*, 522 F.2d 534, 544 (7th Cir. 1975), *cert. denied*, 424 U.S. 976 (1976) (mail fraud); *United States v. Dorfman*, 532 F. Supp. 1118, 1123 (N.D. Ill. 1981) (wire fraud). Feldman claims that the jury was not properly instructed that they were required to find this element in order to convict.

Feldman concedes that the jury was informed that "[t]he phrase 'intent to defraud' used in the crimes charged means that the act was done knowingly with the specific purpose to deceive, in order to cause financial loss to another or financial gain to one's self." He contends, however, that although the jury was given a definition of intent to defraud, they were not instructed that they must find that Feldman performed the acts charged with this specific intent.

Again, in assessing the propriety of an instruction, we must consider all the instructions as a whole. *See United States v. Johnson*, *supra*, 605 F.2d at 1027. In the instant case, the court not only defined intent to defraud, but also read the indictment to the jury, which charged that Joyner and Feldman "devised and intended to devise a scheme and artifice to defraud and for obtaining money and property from Merrill Lynch by means of false and fraudulent pretenses, representations and promises . . . ." The court then charged the jury that in order to sustain its burden of proof on the mail fraud counts, the government must prove "that the defendant knowingly and intentionally participated in the scheme to defraud which is described in the indictment." A like charge was given with respect to the wire fraud counts. The court further instructed the jury that "[a] scheme to defraud under the Federal statutes means some plan to procure money or property by means of false pretenses or representations calculated to deceive persons of ordinary prudence." Thus the jury was informed that, in order to convict, the government must prove that Feldman *knowingly and intentionally* participated in a scheme to procure money or

property from Merrill Lynch by means of false pretenses or representations that were *calculated to deceive*. While the instructions were less than ideal because the phrase "intent to defraud," although it was defined, did not appear in so many words in the burden of proof instructions, we believe that the instructions, considered as a whole, sufficiently apprised the jury that they could convict Feldman only if they found that he committed the acts charged as part of the scheme to defraud with the specific purpose of defrauding Merrill Lynch.

C. *Joyner's Prior Consistent Statement*

As a general rule, in order to be admissible, prior consistent statements must meet both the relevance requirement of Rule 401 of the Federal Rules of Evidence and the hearsay exception requirements of Rule 801. Rule 801(d)(1) provides that a prior statement by a witness is not hearsay if the declarant testifies at trial and is subject to cross-examination concerning the statement, and if the statement is consistent with his testimony and is offered to rebut an express or implied charge against him of recent fabrication or improper influence or motive. Even if these requirements are satisfied, a prior consistent statement would be relevant to rebut a charge of recent fabrication only if the statement were made prior to the time the alleged motive to falsify arose. *See United States v. McPartlin*, 595 F.2d 1321, 1351 (7th Cir. 1979), *cert. denied*, 444 U.S. 833 (1980); *United States v. Quinto*, 582 F.2d 224, 232-33 (2d Cir. 1978).

In the instant case, the government presented evidence that Joyner had made a statement to FBI agents prior to entering into a plea agreement that was consistent with the testimony he gave at trial. Feldman contends that two requirements for admissibility were lacking, asserting first, that there had been no express or implied charge of recent fabrication, and second, that Joyner had the same motive to fabricate at the time he made the prior statement as he had at trial.

In its opening statement, the government informed the jury that Joyner had pled guilty to two counts of the indictment and agreed to cooperate and testify. During its opening statement, the defense elaborated at considerable length on the "deal" Joyner had made with the prosecutors. In its direct examination of Joyner, the government elicited the provisions of the plea agreement. During cross-examination, the defense questioned Joyner about the role the government would play in the event that any state licensing agency should bring a disciplinary action against him. At a side bar conference at which the government was seeking a ruling on the admissibility of the prior consistent statement, the court repeatedly asked the defense if it intended to argue that the plea agreement was a motivation to fabricate. The court pursued the issue for ten pages of trial transcript, receiving only noncommital responses. Finally, after a recess, defense counsel stated that he intended to talk about the plea agreement during closing argument, but that he did not intend to argue that it was a motivation for recent fabrication. However, since the defense could offer no other inference that it intended to draw from the plea agreement, the court permitted the introduction of the prior consistent statement. During closing argument, the defense detailed the advantages Joyner was to receive as a result of the plea agreement, concluding "as long as he convinces you he is telling the truth, his plea bargain is intact. Don't change your story now, pal."

While the government was the first to broach the issue of the plea agreement, we agree with the district court that Feldman's use of the plea agreement was to impliedly charge that it motivated Joyner to fabricate his trial testimony. That requirement of Fed. R. Evid. 801(d)(1) is therefore satisfied.

Feldman argues that Joyner had exactly the same motivation to lie to the FBI in 1978 as he did to lie at trial in 1980, *i.e.* to receive favorable treatment in exchange for implicating Feldman. In this case, there is no evidence that such a motivation did or could have existed in 1978. There is no indication that Joyner had any reason to

expect lenient treatment in exchange for implicating Feldman at that time. The statement made to the FBI prior to entering into a plea agreement was therefore relevant to rebut inferences of recent fabrication motivated by the agreement. *See United States v. LeBlanc*, 612 F.2d 1012, 1017 (6th Cir. 1980), *cert. denied*, 449 U.S. 849 (1980); *Twitty v. Smith*, 614 F.2d 325, 331 (2d Cir. 1979); *United States v. DeLaMotte*, 434 F.2d 289, 293 (2d Cir. 1970), *cert. denied*, 401 U.S. 921 (1971).

D. *The Polygraph Evidence*

Four days before his trial began, Feldman submitted to a polygraph examination, the results of which, Feldman argues, should have been admitted at trial. According to the examiner, Feldman was answering truthfully when he denied that he knowingly participated in a scheme to defraud Merrill Lynch, that he participated in forging the guarantee letters, and that he knew that Albert Cooke did not exist. The government was not notified of the examination until after it had been conducted. The district court refused to admit into evidence the results of the examination.

"[T]he rule in the Seventh Circuit is clear: the exclusion of [polygraph] evidence is within the sound discretion of the trial judge. Only abuse of discretion would render the exclusion erroneous." *United States v. Rumell*, 642 F.2d 213, 215 (7th Cir. 1981) (citations omitted). Feldman's reliance on *McMorris v. Israel*, 643 F.2d 458 (7th Cir. 1981), *cert. denied*, 455 U.S. 967 (1982), in assigning error is misplaced. In that case, we found that in the circumstances of that particular criminal trial, the state prosecutor's unrestricted veto over the use of polygraph evidence was constitutionally infirm. *Id.* at 466. *McMorris* dealt with the power of the prosecutor, an adversary, to unilaterally exclude polygraph evidence. "*McMorris*, however, did not impinge upon the district court's discretion to admit polygraph evidence." *United States v. Lupo*, 652 F.2d 723, 729 (7th Cir. 1981), *cert. denied*, 102 S. Ct. 2964 (1982).

In the instant case, we find no abuse of discretion in the district court's refusal to admit the polygraph evidence, especially in view of the eleventh hour, secret nature of the examination. "[T]here is reason to believe that tests such as the one conducted here, which are performed at the request of the examinee without advance notice to the Government, are particularly unreliable since the examinee knows that if he 'fails' the test his counsel will not submit the results to the Government, and therefore is under less stress." *United States v. Dorfman, supra,* 532 F. Supp. at 1136 (citations omitted).

IV

For the reasons above, Feldman's convictions of mail and wire fraud are affirmed.

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APPENDIX C

UNITED STATES COURT OF APPEALS
For the Seventh Circuit
Chicago, Illinois 60604

August 18, 1983

Before

Hon. WILBUR F. PELL, JR., Circuit Judge
Hon. JESSE E. ESCHBACH, Circuit Judge
Hon. EDWARD R. NEAHER, Senior District Judge[1]

UNITED STATES OF AMERICA, Plaintiff-Appellee,	Appeal from the United States District Court for the Northern District of Illinois, Eastern Division.
No. 82-1611 vs.	No. 81 CR 696
DAVID A. FELDMAN, Defendant-Appellant.	Charles P. Kocoras, Judge.

ORDER

On consideration of the petition for rehearing and suggestion for rehearing en banc filed in the above entitled cause by defendant-appellant, David A. Feldman, no judge in active service has requested a vote thereon, and all of the judges on

1. The Honorable Edward R. Neaher, Senior District Judge for the Eastern District of New York, sitting by designation.

the original panel have voted to deny a rehearing. Accordingly,

IT IS ORDERED that the aforesaid petition for rehearing be, and the same is hereby, DENIED.

APPENDIX D

UNITED STATES COURT OF APPEALS

For the Seventh Circuit

Chicago, Illinois 60604

August 25, 1983

Before

Hon. JESSE E. ESCHBACH, Circuit Judge

Hon. _____

Hon. _____

UNITED STATES OF AMERICA, Plaintiff-Appellee,	Appeal from the United States District Court for the Northern District of Illinois, Eastern Division.
No. 82-1611 vs.	No. 81 CR 696
DAVID A. FELDMAN, Defendant-Appellant.	Charles P. Kocoras, Judge.

On consideration of the "MOTION FOR STAY OF MANDATE" filed herein on August 24, 1983, by counsel for the defendant-appellant,

IT IS ORDERED that said motion is hereby GRANTED, and the mandate of this Court is hereby STAYED to and including September 24, 1983.

APPENDIX E

May it please the Court.

THE COURT: Mr. Tarun.

MR. TARUN: Co-counsel, gentlemen of the defense; and you, the ladies and gentlemen of the jury:

We are getting near the end, and you will be going out to review the evidence in this case, and you will be the finders of fact.

At this time I am given an opportunity to review the evidence that is before you.

What are talking about here? Well, you have known since Day One that it is a scheme to defraud Merrill Lynch, and now you know a lot more. You know about phony partnership agreements. You know about phony new account applications. You know about hidden disbursements. You know about secret beneficial

interests. You know about phony guarantee letters. You know about the proceeds being split 50/50 between the Feldmans and the Joyners, and you know about the expenses of Western Investment Company being split 50/50 between the Joyners and the Feldmans.

What is the bottom line on this scheme? The bottom line on this scheme is playing with the house's money. That is exactly what went on here. They did not put up one thin dime to trade nearly $2 million worth of options. $1,967,000 worth of options were outstanding on January 30, 1978, and they did not put up one dime of collateral to trade nearly $2 million in options.

It is a scheme where David Feldman used his power and his position with Merrill Lynch to keep Merrill Lynch in Hollywood from knowing what was going

on in Chicago with Western Investment Company and Harris Trust.

How was it discovered? Like a lot of sophisticated crimes, there was one foul-up. David Feldman went to San Francisco and his secretary typed out, "Harris Trust & Savings" on a letter instead of "HTS Options". The letter was mailed to Chicago. A mailman delivered it to the real Harris Trust & Savings, and that is how the scheme was uncovered.

David Feldman, when he was in that Hollywood office, made every effort to assure that those guarantee letters were under his control; but when he went to San Francisco, a conscientious secretary typed out the full name, and that is how the scheme was unraveled.

Now, ladies and gentlemen, there is an indictment in this case, and I am not going to read it to you at this time. You are going to have a copy of

this back in the jury room with you. You do not have to worry about memorizing all of the paragraphs. I submit to you that we have proven each and every one of the paragraphs in here.

It starts out by saying that David Feldman, in his employment, was a stockbroker and branch manager of the Hollywood, California Merril Lynch office. It talks in technical terms. It talks about margins. It talks about this scheme of Feldman and Joyner. It talks about the phony partnership agreements with Joyner, Mary Joyner and Augusta Feldman, and it talks about the other partnership agreements, and it goes on in great detail. I am not going to read through it now. The Judge will read it to you during the jury instructions and you will have a copy of it back there in the jury room, so you do not have to worry about memorizing the indictment.

How about the elements? You ought to know what the Government has to prove beyond a reasonable doubt, and essentially there are two elements. First of all, we have to show that David Feldman was in a scheme to defraud Merrill Lynch; and, secondly, we have to show that there were interstate wire communications or mailings in furtherance of the scheme and artiface [sic] to defraud. The Judge will instruct you on the mailings and the wirings, but the important thing to remember is the parties have stipulated that there were interstate wirings and that there were mailings, but that is not even in issue; but the Judge will tell you that those are the two elements we have to prove beyond a reasonable doubt -- that David Feldman was part of the scheme to defraud; and, two, that there were either interstate

wirings or mailings in furtherance of that scheme to defraud.

* * *

A chronological review. We start out in the spring of 1977. We know they were neighbors in Schaumburg. We know that Feldman was in Chicago at that time. He was with Merrill, Lynch down at the Board of Trade, and Joyner was his neighbor. They started talking about starting up an investment company on the side; they can get into the stock options area. Dave Feldman says he is an expert, and they talk about it at Bridge groups, or whatever, during social occasions out in Schaumburg.

They have a series of conversations, as would be expected, and it grows to become more and more serious. By May 6, 1977, they have devised a name for this partnership; they have agreed on the terms -- the split. It is going to be

50/50 between the Feldmans and the Joyners, and they talk about the name.

Do you recall what it was?

Augusta Investments. You saw the partnership agreement -- the original one. That was the agreement, but then Dave Feldman got wise and said, "Wait a minute. Merrill, Lynch might understand who Augusta is. It is my wife's name, so we can't use the name Augusta in this partnership agreement."

So, it starts getting more formal in May. On May 6th and May 9th they talk. Joyners says, "I will get a hold of a lawyer. We will draft a partnership agreement," and that is what we have right here (indicating), P-A-1. You folks saw that on the first day of the case, I believe. You know what it says. It talks about Western Investment Company. That is put in there after, "Augusta" [sic] Investments" was stricken

out. It is a partnership; 50 per cent for the Feldmans, 50 per cent for the Joyners. This is a fraud on Merrill Lynch. It is flat out and simple.

* * *

What happens next is significant. That is July 12th. Do you know how you know that is July 12th? Because you will recall they went through this agreement. On page 4, you will see, "G.E.J., 7-12-77". They had the meeting in the kitchen at Joyners' on July 12th. Feldman came in from California. They talked about it. They went over it, and that is when Feldman said, "We can't use the name Augusta. Merrill Lynch will find out." That is July 12th.

What happens the next day? Do you folks remember? July 13th is the meeting at Hal Dillenbach's office at the Harris Trust & Savings, and what happens there? These two guys go in to this

businessman. One is the head of Merrill Lynch out in Los Angeles and the other one is with Brinks, Inc. They, together, cannot sell Hal Dillenbach on guarantee letters for $50,000. Their assets combined are not good enough for a guarantee letter for only $50,000. I will point out the significance of that in a while.

After the meeting at Harris Trust & Savings in which Dillenbach told them there is no way, that this collateral is not good enough. They drove to the airport. Joyner drove Feldman to the airport. Do you remember what Feldman said on the way? "I think there is another way we can get around it. There is another alternative to get documentation into my files so that we can trade this."

A week later, there is a phone call, and those two discuss putting together the phony letters. The first

one is the million dollar guarantee letter, Government Exhibit 54, and it has got the phony overlay, it has the top stationery that Joyner got from letters that had been sent to him by Harris Trust & Savings, and then you have all of the language that Dave Feldman gave him to draft this phony letter..

That is mailed to Dave Feldman and he puts it into the Merrill Lynch Hollywood office.

What next is significant? Well, you have got Dave Feldman sending a letter to Joyner telling him to sign, "where the X is on these account applications." He does not tell him to fill in the information -- he will do that -- "just sign where the X appears."

This is Feldman's handwriting (indicating). He filled in all of the information. He did not say anything about the Feldmans being part of it.

This is a fraud on Merrill Lynch. It is signed David Feldman and you have Joyner's signature in a different handwriting, and you have Feldman listing Joyner's cash assets at $2 million. Ed Joyner having $2 million.

Several days later, you have got the Western Investment Company new account signature card at Continental Illinois National Bank. The signature of Joyner, Mrs. Joyner and Augusta Feldman. This is a fraud upon Merrill Lynch, but there is more.

Next: Merrill Lynch in Hollywood cannot know the true ownership of Western Investment Company, so what is the next item? Feldman says, "I want a partnership agreement written up which represents that the Joyners are the sole owners of Western Investment Company so that I can file it in the Hollywood branch office so that nobody out there

will know what we are doing." That is the next item. A phony partnership agreement filed in the Merrill Lynch office. This is a fraud upon Merrill Lynch.

You will recall what happened after the blanket or million dollar guarantee letters, there was a change in the procedures. They had to have guarantee letters that pertained to each transaction. Who did the dirty work? Joyner. Where did he get the information? Over the telephone for each transaction from Feldman. Here we have the first series of individual guarantee letters. You will have all of these exhibits back in the jury room, and you can look at them all.

September 17th, the checks start rolling in from Merrill Lynch. What happens with the proceeds? They go into the Continental Bank; checks go out,

one to Augusta Feldman and one to G.E. Joyner. You saw the pattern. It is clear all the way through the scheme.

Does Merrill Lynch know? No. It is a fraud upon Merrill Lynch.

In the Fall the checks continue to come in. The proceeds continue to be divided half and half. Then, you will recall that in December of 1977, a very, very significant event happens. Bob Pereida -- you will recall him, the operations man from the Hollywood branch office -- Bob Pereida gets sensitive information to take to the wire room to prepare a stencil for Dave Feldman, and it says, "HTS Options" on it. He thinks it is abbreviated by Feldman, so he writes out "Harris Trust & Savings". That is awfully significant because do you know what happened? You do. Feldman blew up. They all blew the fraud cover.

Do you recall what Pereida said? Feldman was very, very cool, and that is the one time that Pereida ever remembers David Feldman getting upset. He had never seen him upset before. He had never seen him upset. Over the mislabeling of a letter.

Well, you folks know why he was so upset, because if that letter gets mailed back to Harris Trust & Savings, the whole thing is uncovered, and that is why he blew up with Pereida.

Another significant event. Pereida, he has gone up through the organization and everybody knows at Merrill Lynch that you can get better money in a T-bill than you can get in a million dollars worth of cash sitting in the Harris Trust & Savings; so, in order to help his client, the big guy in Chicago, he said, "Why don't you have him put the money in T-bills here?"

Do you know what Feldman did? Feldman said, "No, he is making more money in a bank account in Chicago." That does not make sense, but there was no Harris Trust & Savings account, and Feldman knew it, so he had to cut off Pereida's T-bill idea just like that.

That brings us to the end of December, and now we are in the new year. January 10th. Do you remember I told you the proceeds were split 50/50? The expenses were split 50/50. There was a call on January 10th to Feldman telling him that the buyer had exercised the option on $158,000 on Allis Chalmers and Continental Oil. They had to come up with $158,000. He called Joyner. Joyner writes a check on the WIC account for $150,305.92. Feldman, unbeknownst to Merrill Lynch -- another fraud on Merrill Lynch -- writes a check in the amount of $49,152.96, exactly one-half.

* * *

February 23rd. A critical date. The whole scheme blows up. That is the date where a letter was received at the real Harris Trust & Savings because Diane Warner had typed out the full name. Harris Trust received the letter. Feldman is in San Francisco. He left the home office. He could not control everything.

He called Joyner. He said, "We've got a serious problem. Harris Trust received it -- the real bank. They called Merrill Lynch in New York and they are coming down on me. I am flying to Chicago on the midnight flight. I will be in Chicago tomorrow morning." You bet he was concerned.

He flies into Chicago. He meets him at 6:30 at O'Hare Airport. He gets Joyner to draft this promissory note which said, "G.E. Joyner, a partner in

Western Investment Company, David Feldman, manager." That is a fraud.

Feldman's name should have been right over there by the "Partners". This is a fraud on Merrill Lynch.

* * *

Now, with respect to the four areas of evidence which independently show David Feldman to be part of this scheme and artifice to defraud, the first area is simply the exhibits in the trial. Take a look and go through them. Look at the way the checks go out. Take a look at the way they go into Feldman's account. This whole thing put a sham on Merrill Lynch. Every single one of these documents -- the partnership agreements are phony, the new account applications are phony, the guarantee letters are phony. Feldman is concealing his interest in Western Investment Company by writing checks to Joyner so that Joyner

can write them to Merrill Lynch on the WIC account. It is all phony.

The exhibits tell the story, ladies and gentlemen. The,second area of evidence which shows Dave Feldman, independently of Ed Joyner, to be in the scheme: Peter Cullen, the gentleman with the Irish accent, the former priest. Feldman told him lie after lie after lie. July of 1977. Feldman flies to Chicago. When he returns, he tells Cullen that the Chicago investors were not ready to open an account. They were looking for additional partners.

I know exactly how Herb Person would describe that.

Two: David Feldman gave Cullen Partnership $2 million in cash. That tells you right then and there that Feldman knew exactly this whole thing was a scam.

Hal Dillenbach, $50,000. If they had been worth $2 million -- or Ed Joyner alone had been worth $2 million -- you can better believe that Harris Trust & Savings would like to have had them for a customer. There is no way Feldman could write down $2 million. That is a flat out lie.

The next area of evidence, the fourth one, is Pereida. The three things I submit to you about Pereida that show that Feldman knew about the fraud and the whole thing: First of all, Mr. Pereida testified that the normal procedure or practice with respect to the exercise of options is that the brokerage house -- Merrill Lynch in this case -- would deliver stock to the bank, Harris Trust -- the people who would have the guarantee letter. Not here. Dave Feldman could not let that happen. There was no

Harris Trust and he knew it, so he told Pereida to do the abnormal procedure.

Another normal practice that Mr. Cullen testified to was that guarantee letters would normally be filed either in the city where the bank was -- the depository, which would be the Chicago office -- or they would be filed in the major office where the branch Merrill Lynch house was located. That means the big L.A. office. Feldman would not let that happen either. He did not want those guarantees letters being at the Los Angeles branch office when he was in Hollywood. He wanted them in the Hollywood vault to make sure nobody mailed them back to Harris Trust & Savings by mistake.

His one shortcoming was going to San Francisco and his secretary typing out "Harris Trust & Savings". He tried

to control it as much as he could, but he made one critical mistake.

Two other things by Pereida. Pereida took the stencils to the wire room, and with the man who was cool -- the manager who was cool -- who had never been excited before, "the only time I have ever seen him lose his temper," over a stencil? Over it being Harris Trust & Savings instead of HTS? You know why he was upset. It almost blew the scam.

The third thing from Pereida -- the fourth area of evidence which proves the independent involvement of Dave Feldman -- was the T-bills. They could make a lot more money investing that money in T-bills than at Harris Trust & Savings, if Western Investment Company had any money there, but Dave Feldman knew it was a sham and he had to throw Pereida off right away on that T-bill idea.

"The customer --" he did not disclose that it was him -- "is making more money keeping the cash in "the bank. [sic]" That is a flat out lie. You would make more money with T-bills.

So, ladies and gentlemen, those are the four areas of evidence which independent of the testimony of Ed Joyner prove that David Feldman was a part of a major scheme to defraud Merrill Lynch: that David Feldman, without using a dime, wanted to trade $2 million worth of risky options at his Merrill Lynch office.

The evidence comes from Pereida, it comes from Joyner, it comes from Cullen, it comes from Dillenbach, it comes from everyone. You have heard it in this case.

Ladies and gentlemen, you took an oath at the beginning of this trial that you would review the evidence and that you would be true and impartial fact

finders. I submit to you that when you review this evidence, there is no alternative but to find David Feldman guilty of 28 counts; David Feldman, guilty as charged.

Thank you.

APPENDIX F

THE COURT: Members of the jury, the evidence and arguments in this case have been completed, and I will now instruct you as to the law applicable to this case. It is your duty to follow all of the instructions.

You must not question any rule of law stated by me in these instructions. Regardless of any opinion you may have as to what the law ought to be, you must base your verdict upon the law given by me.

It is your duty to determine the facts from the evidence in this case. You are to apply the law given to you in these instructions to the facts, and in this way decide the case.

You are the sole judges of the credibility of the witnesses and of the weight to be given to the testimony of each of them. In considering the testi-

mony of any witness, you may take into account his or her intelligence, his ability and opportunity to observe, his or her age, memory, manner while testifying, any interest, bias or prejudice he or she may have, and the reasonableness of his or her testimony considered in the light of all of the evidence in the case.

Neither by these instructions, nor by any ruling or remark which I have made, do I mean to indicate any opinion as to the facts or as to what your verdict should be. You are the sole and exclusive judges of the facts.

Opening statements of counsel are for the purpose of acquainting you in advance with the facts counsel expects the evidence to show. Closing arguments of counsel are for the purpose of discussing the evidence.

Opening statements, closing arguments, and other statements of counsel

should be disregarded to the extent they are not supported by the evidence.

During the course of trial it often becomes the duty of counsel to make objections and for me to rule on them in accordance with the law. The fact that counsel made objections should not influence you in any way.

The evidence consists of the sworn testimony of the witnesses, the exhibits received in evidence, and stipulated, admitted or judicially noticed facts.

A stipulation is an agreed statement of facts between the parties, and you should regard agreed statements as true.

You are to consider only the evidence received in this case. You should consider this evidence in the light of your own observations and experiences in life. You may draw such reasonable inferences as you believe to be justified from proved facts.

You are to disregard any evidence to which I sustain an objection or which I ordered stricken. Anything you may have seen or heard about this case outside the courtroom is not evidence and must be entirely disregarded. You should not be influenced by sympathy, prejudice, fear or public opinion.

The indictment in this case is the formal method of accusing the defendant of a crime and placing him on trial. It is not evidence against the defendant and does not create any inference of guilt.

The defendant is charged with the crimes of mail fraud and wire fraud. The defendant has denied that he is guilty of the charges.

The indictment, a copy of which will be sent back to the jury room, charges in substance as follows:

It charges, ladies and gentlemen, that at all times material herein, David

Feldman, defendant herein, was a stock-broker and branch manager of the Hollywood, California office of Merrill Lynch, Pierce, Fenner & Smith, Inc.; hereinafter referred to as Merrill Lynch.

It further charges that at all times material, Merrill Lynch was a stock brokerage corporation with its main office in New York, and branch offices doing business in the Northern District of Illinois, the State of California and elsewhere.

It charges that at all times material herein, a Put was a stock option which gave the option buyer the right, during a specified period of time, to sell particular stock to the option seller at a fixed price. The buyer of a Put option paid the seller a premium for the option.

That at all times material herein, Merrill Lynch was authorized to buy and

sell stock and stock options for its customers on the American Stock Exchange, the Chicago Board of Options Exchange, the Pacific Stock Exchange, the Midwest Stock Exchange and the Philadelphia, Baltimore and Washington Stock Exchange.

It is also charged that at all times material, it was standard business procedure for Merrill Lynch to execute a customer's order to buy or sell stock options in the following manner:

The branch office receiving the order would record the transaction on an order ticket and forward the order by wire to the city where the appropriate exchange is located. A representative of Merrill Lynch on the exchange floor would execute the order. The exchange then would send a confirmation by wire to the originating office which would forward the confirmation to its customer.

Paragraph 6 charges that at all times material, Merrill Lynch was required to maintain margins (cash or collateral in such forms as bank guarantee letters) sufficient to insure that Merrill Lynch had available financial resources to purchase the stock subject to Put options that it had sold, in the event these Put options were exercised.

Paragraph 7 of Count I charges that at all times material herein, Merrill Lynch required customers, who sold Put options through Merrill Lynch, to maintain margin (again, cash or collateral in such forms as bank guarantee letters) sufficient to insure that the customer had available financial resources to purchase any stock subject to these Put options in the event the Put options were exercised.

Paragraph 8 says, "Beginning in or about December of 1977, and continuing

thereafter up to and including March, 1978, at Chicago in the Northern District of Illinois, Eastern Division and elsewhere, David A. Feldman and George Edgar Joyner, defendants herein, devised "and intended to devise a scheme and artifice to defraud and for obtaining money and property from Merrill Lynch by means of false and fraudulent pretenses, representations and promises; the defendants well knowing at the time that said pretenses, representations and promises would be and were false and fraudulent when made; which scheme and artifice to defraud was, in substance, as follows:"

Paragraph 9:

"The purpose of the scheme and artifice to defraud was to induce Merrill Lynch to sell Put options for the defendants without the defendants producing the required margin. The defendants submitted

false and fraudulent bank guarantee letters to fulfill their margin requirements.

"In reliance on these letters, Merrill Lynch sold Put options for the defendants and the defendants received, approximately, $362,300 in premiums from Merrill Lynch for the Put options sold."

Paragraph 10:

"It was part of said scheme and artifice to defraud that David A. Feldman and George Edgar Joyner, defendants herein, caused the partnership agreement dated June 10, 1977, to be prepared. Said partnership agreement named George Edgar Joyner, Mary C. Joyner -- Edgar Joyner's wife -- and Augusta Feldman -- David A. Feldman's Wife -- as partners in Western Investment Company for the purpose of investments

and marketable securities options, bonds, and real estate. This included investments made on margin, in addition to case transactions."

Paragraph 11:

"It was further a part of said scheme and artifice to defraud that on or about August 10, 1977, the defendants opened and caused to be opened business checking account No. 78-33148 in the name of Western Investment Company at Continental Bank, Chicago, Illinois."

Paragraph 12:

"It was further a part of said scheme and artifice to defraud that on or about September 9, 1977, the defendants opened and caused to be opened margin accounts Nos. 220-07013 and 220-07014 in the names of Western Investment Company, George Edgar Joyner and Mary C. Joyner, at

Merrill Lynch for the purpose of purchasing and selling Put options."

Paragraph 13:

"It was further a part of said scheme and artifice to defraud that the defendant, David A. Feldman, as an employee of Merrill Lynch, would and did manage these accounts and personally wrote all orders to buy and sell Puts in these accounts."

Paragraph 14:

"It was further a part of said scheme and artifice to defraud that the defendants caused the partnership agreement dated June 10, 1977, to be filed with Merrill Lynch. Said partnership agreement named George Edgar Joyner and his wife, Mary C. Joyner, as partners in Western Investment Company. This agreement was substantially identical to the partnership aqreement

described in Paragraph 10, except that Augusta Feldman, David Feldman's wife, was not named in and did not sign the agreement."

Paragraph 15 of Count I:

"It was further a part of said scheme and artifice to defraud that after Harris Trust & Savings Bank, Chicago, Illinois, refused to issue letters guaranteeing credit to Western Investment Company as margins for Put options which Western Investment Company intended to sell to buyers, the defendants issued and caused to be issued counterfeit guarantee letters on counterfeit Harris Trust & Savings Bank letterhead. Said guarantee letters falsely represented to Merrill Lynch that Harris Bank had certain sums of money on deposit in the account of Western Investment Company, which

would be held for Merrill Lynch as margin for certain Put options sold by Western Investment Company. Merrill Lynch required said guarantee letters as a prerequisite to executing the transaction so that they could seek payment from Harris Bank for that transaction, if the Western Investment Company accounts were debited beyond the cash available in said account."

Paragraph 16 of Count I charges:

"It was further a part of said scheme and artifice to defraud that the defendants would and did misrepresent to Merrill Lynch that these guarantee letters were valid so that Merrill Lynch would rely on these guarantee letters as satisfying their margin requirement governing the execution of the Put

option transactions requested by the defendants.

"When Merrill Lynch discovered that the bank guarantee letters were fraudulent, they were required to buy back approximately $300,000 of the Put options sold for the defendants so that they would not be in violation of their margin requirement."

Paragraph 17:

"It was further a part of said scheme and artifice to defraud that the defendants issued and caused to be issued tickets which were wired to various stock exchanges including Chicago, Illinois, Los Angeles, California, Philadelphia, Pennsylvania and New York, New York, which authorized stock brokers to sell Put options on behalf of Western Investment Company."

Paragraph 18:

"It was further a part of said scheme and artifice to defraud that premiums received by Western Investment Company in return for selling Put option were credited to the Western Investment Company accounts at Merrill Lynch."

Paragraph 19:

"It was further a part of said scheme and artifice to defraud that the defendants caused Merrill Lynch to send brokerage statements to Western Investment Company, 'attention: George Edgar Joyner, 332 Branchwood Court, Schaumburg, Illinois 60193.'"

Paragraph 20:

"It was further a part of said scheme and artifice to defraud that the defendants caused Merrill Lynch to issue premium checks for Put

options transactions to Western Investment Company in Schaumburg, Illinois, which checks were deposited into Western Investment Company account No. 78-33148 at Continental Bank, Chicago, Illinois."

Paragraph 21:

"It was further a part of said scheme and artifice to defraud that the defendants caused checks to be drawn from account No. 78-33148, which were made out to Augusta R. Feldman and G. E. Joyner, defendant herein, in equal amounts."

Paragraph 22:

"It was further a part of said scheme and artifice to defraud that in or about January 1978, the defendants contracted and caused to be contracted Kay's Services Company, a telephone answering and mail receiving service, to answer calls and

receive mail in the name of Albert R. Cooke, vice president, HST Options, Room 1161, 171 West Monroe Street, Chicago, Illinois."

Paragraph 23:

"It was further a part of said scheme and artifice to defraud that David Feldman, defendant herein, directed Merrill Lynch to send all Western Investment Company correspondence to Albert Cooke, HST Options, Room 1161, 171 West Monroe Street, Chicago, Illinois."

Paragraph 24:

"On or about the dates listed below in the Northern District of Illinois, Eastern Division, and elsewhere, David A. Feldman and George Edgar Joyner, "defendants herein, for the purpose of executing the aforesaid scheme and artifice to defraud, and attempting to do so,

knowingly caused the envelopes listed below to be delivered according to the directions thereon by the United States Postal Service; each such use of the mails being a separate count of this indictment."

Thereafter, ladies and gentlemen, there is a listing from Counts I to Count XIX, particular senders, particular contents of mailings, particular addressees and dates of delivery on or about a certain time. That is Counts I through XIX, and all of that is in violation, it is said, of Title 18, United States Code, Section 1341.

Now, Counts XX through XXVIII.

Paragraph 1 of those counts charges as follows:

"The Grand Jury realleges and incorporates by reference Paragraphs 1 through 23 of Counts I through XIX

of this indictment as though fully set forth herein.

"On or about the dates listed below in the Northern District of Illinois, Eastern Division, and elsewhere, David Feldman and George Edgar Joyner, defendants herein, for the purpose of executing the aforesaid scheme and artifice to defraud, and to obtain money and property by means of false and fraudulent pretenses, representations, and promises, and attempting to do so, transmitted and caused to be transmitted by means of wire in interstate commerce certain writings, signs, signals and sounds, to wit: the wiring of the Put options tickets listed below, written on the Western Investment Company account from Merrill Lynch, Hollywood, California, to the Chicago Board of

Options Exchange and Midwest Stock Exchange in Chicago, Illinois. Each such use of the wires being a separate count of this indictment."

Thereafter, ladies and gentlemen -- and you will have this indictment back in the jury room with you so that you can see what I am referring to -- it lists separately Counts XX through Count XXVIII with a designated sender, the designated contents of the wire, the designated addressee, and the date on or about which the transmission was allegedly caused to be made.

All of that -- that is, Counts XX through XXVIII -- was alleged to be in violation of Title 18, United States Code, Section 1343.

As I indicated to you, that is the substance of the indictment in this case, and the defendant has denied that he is guilty of these charges.

The defendant is presumed to be innocent of the charges. This presumption remains with the defendant throughout every stage of the trial and during your deliberations on the verdict, and is not overcome unless from all of the evidence in the case you are convinced beyond a reasonable doubt that the defendant is guilty.

The Government has the burden of proving the guilt of the defendant beyond a reasonable doubt, and this burden remains on the Government throughout the case. The defendant is not required to prove his innocence or to produce any evidence.

There are two types of evidence: direct and circumstantial. Direct evidence is the testimony of a person who claims to have personal knowledge of the commission of the crime which has been charged, such as an eyewitness. Circum-

stantial evidence is the proof of a chain of facts and circumstances which tend to show whether the defendant is guilty or not guilty. The law makes no distinction between the weight to be given either direct or circumstantial evidence. Therefore, all of the evidence in this case, including the circumstantial evidence, should be considered by you in arriving at your verdict.

The defendant has an absolute right not to testify. The fact that the defendant did not testify should not be considered by you in any way in arriving at your verdict.

The witness, Edgar Joyner, has pleaded guilty to a crime arising out of the same occurrence for which the defendant is now on trial. In addition, you have also heard testimony that he has received certain benefits from the government in connection with this case.

You may give his testimony such weight as you feel it deserves, keeping in mind that it must be considered with caution and great care. Moreover, his guilty plea is not be considered as evidence against the defendant.

There have been admitted in evidence certain schedules or summaries. They truly and accurately summarize the contents of voluminous books, records or documents, and should be considered together with and in the same manner as all other evidence in the case.

A defendant need not personally perform every act constituting the crime charged. Every person who wilfully participates in the commission of a crime may be found guilty.

Whatever a person is legally capable of doing, he can do through another person by causing that person to perform the act. If the acts of another are

wilfully ordered, directed or authorized by the defendant, he is responsible for such acts as though he personally committed them.

Counts I through XIX of the indictment charge violations of the Federal mail fraud statute which provides that:

> "Whoever having devised or intending to devise any scheme to defraud, or for obtaining money or property by means of false or fraudulent pretenses, representations or promises, for the purpose of executing such scheme or attempting to do so, knowingly causes to be delivered by mail according to the directions thereon, or at the place at which it is directed to be delivered by the person to whom it is addressed, any such matter or thing --"

is guilty of an offense against the laws of the United States.

Defendant is charged in Counts I through XIX with mail fraud. In order to sustain its burden of proof on each of those counts of the indictment, the Government must prove both of the following propositions:

> "First, that the defendant knowingly and intentionally participated in the scheme to defraud which is described in the indictment.
>
> Second, that for the purpose of carrying out the scheme or attempting to do so, the defendant caused the U.S. mails to be used in the manner charged in the particular count."

If you find from your consideration of all of the evidence that both of these propositions have been proved beyond a reasonable doubt on a particular count,

you should find the defendant guilty on that count.

If, on the other hand, you find from your consideration of all of the evidence that these propositions have not been proved beyond a reasonable doubt on a particular count, you should find the defendant not guilty on that count.

Counts XX though XXVIII of the indictment charge violations of the Federal Wire fraud statute which provides that:

> "Whoever, having devised or intending to devise any scheme to defraud, or for obtaining money or property by means of false or fraudulent pretenses, representations or promises, transmits or causes to be transmitted by means of wire communication in interstate or foreign commerce, any writings, signs, signals, pictures or sounds

for the purpose of executing such scheme --"

is guilty of an offense against the laws of the United States.

Defendant is charged in Counts XX through XXVIII with wire fraud. In order to sustain its burden of proof on each of those counts of the indictment, the Government must prove both of the following propositions:

First, that the defendant knowingly and intentionally participated in the scheme to defraud which is described in the indictment. Second, that for the purpose of carrying out the scheme, the defendant caused interstate wire communications to take place in the manner charged in the particular count.

If you find from your consideration of all of the evidence that both of these propositions have been proved beyond a reasonable doubt on a particular count,

you should find the defendant guilty on that count.

If, on the other hand, you find from your consideration of all of the evidence that these propositions have not been proved beyond a reasonable doubt on a particular count, you should find the defendant not guilty on that count.

It is not necessary for the mailing of matter or transmission of a wire communication in interstate commerce named in each count of the indictment to have been mailed or transmitted by defendant personally.

It is sufficient for this element of the crime if the matters were placed in the mails or transmitted in interstate commerce in the ordinary course of business as a natural and probable consequence of the plan or scheme that had been devised and for the purpose of furthering the same.

The mailing or interstate wire communication need not be on its face a fraudulent representation or promise, or request for money, but need only be intended to assist in carrying out the scheme to defraud.

A scheme to defraud under the Federal statutes means some plan to procure money or property by means of false pretenses or representations calculated to deceive persons or ordinary prudence.

It is not necessary that the Government prove all of the false pretenses, representations and acts charged in the portion of the indictment describing the scheme. It is essential only that one or more of them be proved which shows the existence of the scheme to defraud.

The phrase "intent to defraud" used in the crimes charged means that the act was done knowingly with the specific

purpose to deceive, in order to cause financial loss to anotehr [sic] or financial gain to one's self.

Intent ordinarily may not be proved directly, but you may infer the defendant's intent from the surrounding circumstances. You may consider any statement or action made or omitted by the defendant, and all other facts and circumstances in evidence which indicate his state of mind.

When the word "knowingly" is used in these instructions, it means that the defendant realized what he was doing and was aware of the nature of his conduct, and did not act through ignorance, mistake or accident. Knowledge may be proven by defendant's conduct and by all of the facts and circumstances surrounding the case. No person can intentionally avoid knowledge by closing his

eyes to facts which should prompt him to investigate.

A telephone call between parties in two different states, a bank wire between banks in two different states or telegraphic communication between two different states all constitute a transmission by means of wire communication in interstate commerce for purposes of the wire fraud statute.

Under the mail fraud and wire fraud statutes each separate use of the mails and each separate interstate wire communication in furtherance of the scheme to defraud constitutes a separate offense.

You may only convict the defendant of the scheme charged in the indictment. Should you find that the defendant violated the practices and procedures of Merrill Lynch, Pierce, Fenner & Smith, this alone is not sufficient to convict

the defendant of the scheme charged in the indictment.

Each count and the evidence relating to it should be considered separately, and a separate verdict should be returned as to each count. Your verdict of guilty or not guilty of an offense charged in one count should not control your decision as to any other count.

In determining the guilt or innocence of the defendant, the jury should not give any consideration to the matter of punishment, for this question is exclusively the responsibility of the Judge.

The verdict must represent the considered judgment of each juror. Your verdict, whether it be guilty or not guilty, must be unanimous.

You should make every reasonable effort to reach a verdict. In doing so, you should consult with one another,

express your own views and listen to the opinions of your fellow jurors. Discuss your differences with an open mind. Do not hesitate to re-examine your own views and change your opinion if you come to believe it is wrong, but you should not surrender your honest beliefs about the weight or effect of evidence solely because of the opinions of your fellow jurors or for the purpose of returning a unanimous verdict.

The twelve of you should give fair and equal consideration to all the evidence and deliberate with the goal of reaching an agreement which is consistent with the individual judgment of each juror.

You are impartial judges of the facts. Your sole interest is to determine whether the Government has proved its case beyond a reasonable doubt.

Upon retiring to the jury room, select one of your number as your foreperson. The foreperson will preside over your deliberations and will be your representative here in court.

Forms of verdict have been prepared for you.

There are three forms of verdict. One of the forms reads:

"We, the jury, find the defendant David A. Feldman guilty as charged in the indictment." That is to be used if you find Mr. Feldman guilty as to each count in the indictment.

Another form of verdict reads:

"We, the jury, find the defendant David A. Feldman not guilty as charged in the indictment." This form of verdict should be used if you find Mr. Feldman not guilty as to each count in the indictment.

The third form of verdict reads:

"We, the jury, find the defendant David A. Feldman guilty as charged in Counts ___ of the indictment and not guilty as charged in Counts ___ of the indictment." This form of verdict will be used by you if you find Mr. Feldman guilty of some counts in the indictment and not guilty of some counts in the indictment.

Take these forms to the jury room, and when you have reached unanimous agreement on the verdict, your foreperson will fill in and date the appropriate form, and each of you will sign it.

I do not anticipate that you will need to communicate with me. If you do, however, the only proper way is in writing, signed by the foreperson; or if he or she is unwilling to do so, by some other juror and given to the marshall.

In addition to the indictment that is going to go back with you, I am also

going to send back with you a copy of the instructions wich I have just read for you, as well as the verdict forms; and in due course, you will get the evidence admitted in this case, which should go back to you.

APPENDIX G

U.S. CONST. Amend. V:

> No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offense to be twice put in jeopardy of limb or life; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation

U.S. CONST. Amend. VI:

> In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defense.

18 U.S.C. 1341

> Whoever, having devised or intending to devise any scheme or artifice to defraud, or for obtaining money or property by means of false or fraudulent pretenses, representations, or promises, or to sell, dispose of, loan, exchange, alter, give away, distribute, supply, or furnish or procure coin, obligation, security, or other article, or anything represented to be or intimidated or held ot to be such counterfeit or spurious article, for the purpose of executing such scheme or artifice or attempting so to do, places in any post office or authorized depository for mail matter, any matter or thing whatever tro be sent or delivered by the Postal Service, or takes or receives therefrom, any such matter or thing, or knowingly causes to be delivered by mail according to the direction thereon, or at the place at which it is directed to be delivered by the person to whom it is addressed, any such matter or thing, shall be fined not more than $1,000 or imprisoned not more than five years, or both.

18 U.S.C. 1343:

> Whoever, having devised or intending to devise any scheme or artifice to defraud, or for obtaining money or property by means of false or fraudulent pretenses, representations, or promises, transmits or causes to be transmitted by means of wire, radio, or television communication in inter-

state or foreign commerce, any writings, signs, signals, pictures, or sounds for the purpose of executing such scheme or artifice, shall be fined not more than $1,000 or imprisoned not more than five years, or both.